Falls Church
Manassas
Manassas Park

Washington

Portland-Vancouver, OR-WA
Clark Co
Seattle-Tacoma, WA
King Co
Pierce Co
Snohomish Co
Spokane, WA
Spokane Co
Yakima, WA
Yakima Co

West Virginia

Stuebenville-Weirton, OH-WV
Brooke Co
Hancock Co

Wisconsin

Duluth, MN-WI
Douglas Co
Minneapolis-St. Paul, MN-WI
St Croix Co

[FR Doc. 88-12364 Filed 6-3-88; 8:45 am]
BILLING CODE 6560-50-M

[1] Ventura Co. in California was not included it is physically separated from the South Coast Air Basin by a mountain range.

[2] Santa Cruz Co. in California was not included because it is physically separated from the Bay Area by a mountain range.

[3] The counties (or cities or townships) are part of the previous planning area but not part of the CMSA and MSA.

Federal Register

Monday
June 6, 1988

Part III

Department of Transportation

Research and Special Programs Administration

City of Maryland Heights (Missouri) Application for Inconsistency Ruling; Public Notice and Invitation to Comment

DEPARTMENT OF TRANSPORTATION

Research and Special Programs Administration

[Docket No. IRA-43]

City of Maryland Heights (Missouri) Application for Inconsistency Ruling; Public Notice and Invitation to Comment

AGENCY: Research and Special Programs Administration, DOT.

ACTION: Public notice and invitation to comment.

SUMMARY: The City of Maryland Heights, Missouri, has applied for an administrative ruling determining whether its requirement for a $1,000 bond for each vehicle carrying hazardous and other wastes is inconsistent with the Hazardous Materials Transportation Act (HMTA), and the Hazardous Materials Regulations (HMR) issued thereunder and, therefore, preempted under section 112(a) of the HMTA.

DATES: Comments received on or before July 29, 1988, and rebuttal comments received on or before September 16, 1988, will be considered before an administrative ruling is issued by the Director of the Office of Hazardous Materials Transportation. Rebuttal comments may discuss only those issues raised by comments received during the initial comment period and may not discuss new issues.

ADDRESSES: The application and any comment received may be reviewed in the Dockets Unit, Research and Special Programs Administration, Room 8426, Nassif Building, 400 7th Street, SW., Washington, DC 20590. Comments and rebuttal comments on the application may be submitted to the Dockets Unit at the above address, and should include the Docket Number, IRA-43. Three copies are requested. A copy of each comment and rebuttal comment must also be sent to Mr. Michael K. Moran, Building Commissioner, City of Maryland Heights, 212 Millwell Drive, Maryland Heights, MO 63043, and that fact certified to at the time comment is submitted to the Dockets Unit. (The following format is suggested: "I hereby certify that copies of this comment have been sent to Mr. Moran at the address specified in the **Federal Register**.")

FOR FURTHER INFORMATION CONTACT: Edward H. Bonekemper III, Senior Attorney, Office of the Chief Counsel, Research and Special Programs Administration, 400 7th Street, SW., Washington, DC 20590, telephone 202-366-4362.

SUPPLEMENTARY INFORMATION:

1. Background

The HMTA (49 App. U.S.C. 1801 et seq.) at section 112(a) (49 App. U.S.C. 1811(a)) expressly preempts "any requirement, of a State or political subdivision thereof, which is inconsistent with any requirement" of the HMTA or the HMR issued thereunder.

Procedural regulations implementing section 112(a) of the HMTA and providing for the issuance of inconsistency rulings are codified at 49 CFR 107.201 through 107.211. An inconsistency ruling is an advisory administrative opinion as to the relationship between a state or political subdivision requirement and a requirement of the HMTA or HMR. Section 107.209(c) sets forth the following factors which are considered in determining whether a state or local requirement is inconsistent:

(1) Whether compliance with both the state or local requirement and the HMTA or HMR is possible (the "dual compliance" test); and

(2) The extent to which the state or local requirement is an obstacle to the accomplishment and execution of the HMTA and the HMR (the "obstacle" test).

Inconsistency rulings do not address issues of preemption under the Commerce Clause of the Constitution or under statutes other than the HMTA.

In issuing its advisory inconsistency rulings concerning preemption under the HMTA, OHMT is guided by the principles enunciated in Executive Order 12612 entitled "Federalism" (52 FR 41685, Oct. 30, 1987). Section 4(a) of that Executive Order authorizes preemption of state laws only when the statute contains an express preemption provision, there is other firm and palpable evidence of Congressional intent to preempt, or the exercise of state authority directly conflicts with the exercise of Federal authority. The HMTA, of course, contains an express preemption provision, which OHMT has implemented through regulations and interpreted in a long series of inconsistency rulings beginning in 1978.

2. The Application for Inconsistency Ruling

On May 13, 1988, Michael K. Moran, Building Commissioner of the City of Maryland Heights, Missouri, filed an inconsistency ruling application. That application requested a ruling concerning the consistency with the HMTA of the following prohibition in section I of the City's Ordinance 88-378:

> No person shall haul sewage, sludge, human excrement, special, hazardous or infectious wastes without providing a bond in the amount of One Thousand Dollars ($1,000) per vehicle for each vehicle, hauling or to haul sewage, sludge, human excrement, special, hazardous or infectious waste.

The City has requested that this section be reviewed for consistency with the insurance and indemnification requirements of the HMTA. OHMT will consider its consistency with all relevant provisions of both the HMTA and the HMR.

On the issue of consistency, the City states:

> We believe this bonding requirement is not in conflict with the Hazardous Materials Transportation Act inasmuch as it imposes an additional requirement upon haulers; it does not exempt, or attempt to exempt them from the requirements of the Hazardous Materials Transportation Act.

3. Public Comment

Comments should be restricted to the issue of whether the requirement in Section 1 of Ordinance 88-378 of the City of Maryland Heights, Missouri, for a $1,000 bond for each vehicle carrying hazardous and other wastes is inconsistent with the HMTA or the HMR. They should specifically address the "dual compliance" and "obstacle" tests described above under "Background."

Among the issues to be addressed are: Is there any conflict with HMTA or HMR requirements? How great a burden or obstacle is the $1,000 per vehicle bond? Is any such "obstacle" an obstacle to the HMTA or HMR or merely to transportation?

Commenters should note that the 49 CFR 387.15 insurance requirements for highway transportation of hazardous wastes and other hazardous materials were not issued under the HMTA and thus are irrelevant to this proceeding.

Persons intending to comment on the application should examine the complete application in the RSPA Dockets Branch, including the text of Ordinance 88-378, and the procedures governing the Department's consideration of applications for inconsistency rulings (49 CFR 107.201-107.211).

Issued in Washington, DC, on May 31, 1988.

Alan I. Roberts,

Director, Office of Hazardous Materials Transportation.

[FR Doc. 88-12627 Filed 6-3-88; 8:45 am]

BILLING CODE 4910-60-M

Federal Register

Monday
June 6, 1988

Part IV

Environmental Protection Agency

40 CFR Parts 264, 265, and 270
Delay of the Closure Period for Hazardous Waste Management Facilities; Proposed Rule

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 264, 265, and 270

[FRL-3334-2]

Delay of the Closure Period for Hazardous Waste Management Facilities

AGENCY: Environmental Protection Agency.

ACTION: Proposed rule.

SUMMARY: The Environmental Protection Agency (EPA) is proposing to amend portions of the closure requirements under Subtitle C of the Resource Conservation and Recovery Act (RCRA) applicable to owners and operators of certain types of hazardous waste land disposal facilities. The proposed amendments would allow, under limited circumstances, a landfill or surface impoundment to remain open after the final receipt of hazardous wastes in order to receive non-hazardous wastes in that unit. This proposed rule details the circumstances under which a unit may remain open to receive non-hazardous wastes and describes the conditions applicable to such units.

DATE: Comments must be submitted on or before July 21, 1988.

ADDRESS: The public must send an original and two copies of their comments to: EPA RCRA Docket (S-201) (WH-562), 401 M Street SW., Washington, DC 20460.

Place the docket #F-88-DCPP-FFFFF on your comments. For additional details about the OSW docket see the "OSW Docket" section in "Supplementary Information".

FOR FURTHER INFORMATION CONTACT: The RCRA Hotline at (800) 424-9346 (toll free) or (202) 382-3000 in Washington, DC, or Sharon Frey, Office of Solid Waste (WH-563), U.S. Environmental Protection Agency, 401 M Street SW., Washington, DC 20460, (202) 475-6725.

SUPPLEMENTARY INFORMATION: The OSW docket is located at: EPA RCRA Docket (Sub-basement), 401 M Street SW., Washington, DC 20460.

The docket is open from 9:00 to 4:00 Monday through Friday, except for Federal holidays. The public must make an appointment to review docket materials. Call 475-9327 for appointments. The public may copy materials at the cost of $.15/page. Charges under $15.00 are waived.

Preamble Outline

I. Authority

These requirements are proposed under the authority of sections 1006, 2002(a), 3004, 3005, and 3006 of the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act of 1976, as amended (42 U.S.C. 6905, 6912(a), 6924, 6925, and 6926).

II. Background

Section 3004 of RCRA Subtitle C requires the Administrator of EPA to promulgate regulations establishing such performance standards applicable to owners and operators of hazardous waste treatment, storage, or disposal facilities (TSDFs), as may be necessary to protect human health and the environment. Section 3005 requires the Administrator to promulgate regulations requiring each person owning or operating a TSDF to have a permit, and to establish requirements for permit applications. Recognizing that a period of time would be required to issue permits to all facilities, Congress created "interim status" in section 3005(e) of RCRA. Owners and operators of existing hazardous waste TSDFs who qualify for interim status will be treated as having been issued permits until EPA takes final administrative action on their permit applications. The privilege of carrying on operations during interim status carries with it the responsibility of complying with appropriate portions of the section 3004 standards.

EPA has issued several sets of regulations to implement RCRA section 3004. These regulations include Part 264 (which provides standards for owners and operators of TSDFs that have been issued RCRA permits) and Part 265 (which provides standards for owners and operators of interim status TSDFs) of Title 40 of the *Code of Federal Regulations* (CFR). Subpart G within these two Parts addresses requirements for closing TSDFs and maintaining them after closure if necesary. The Subpart G requirements in both of these Parts, particularly the closure deadlines found in §§ 264.112, 265.112, 264.113, and 265.113, would be affected by the promulgation of today's proposal.

The requirements at §§ 264.113 and 265.113 were last amended on May 2, 1986 (51 FR 16422). Prior to that final rule, §§ 264.113(a) and 265.113(a) required the owner or operator to treat, remove from the site, or dispose of all hazardous wastes in accordance with the approved closure plan within 90 days after receiving the final volume of *hazardous* wastes (or for interim status facilities, within 90 days after approval of the closure plan, if that is later). Prior to the May 2, 1986, rules, §§ 264.113(b) and 265.113(b) also required the owner or operator to complete closure activities within 180 days after receiving the final volume of *wastes* (or approval of the closure plan). Preambles and supporting documents to the earlier rulemakings on May 19, 1980 and January 12, 1981 did not address the rationale for distinguishing between the deadlines for the final receipt of *hazardous* waste in §§ 264.113(a) and 265.113(a) and the final receipt of both hazardous and non-hazardous waste in the deadlines in §§ 264.113(b) and 265.113(b).

To make §§ 264.113(b) and 265.113(b) consistent with the deadlines in §§ 264.113(a) and 265.113(a), the Agency proposed, on March 19, 1985, that closure be completed within 180 days after the final receipt of *hazardous* wastes rather than after the final receipt of wastes (50 FR 11068). The changes to §§ 264.113(b) and 265.113(b) were promulgated as proposed on May 2, 1986 (51 FR 16422), following public comment. After promulgation of the May 2, 1986, amendments, lawsuits were filed challenging the requirement that closure be completed within 180 days after the final receipt of *hazardous* waste. The litigants, Union Carbide Corporation (Union Carbide) and the Chemical Manufacturers Association (CMA), contended that this change was inconsistent with the Congressional intent evidenced in the Hazardous and Solid Waste Amendments (HSWA) legislative history regarding closure of surface impoundments, and further that the change was unnecessary to protect human health and the environment, and that it would discourage waste minimization and other goals Congress expressed in HSWA.

Union Carbide and CMA were particularly concerned about the effect of the amended closure regulations on surface impoundments that ceased the receipt of hazardous wastes in compliance with section 3005(j) of RCRA. This section of the statute requires that all surface impoundments that had interim status on November 8, 1984, either satisfy certain minimum technological requirements (MTRs) (i.e., double liner, leachate collection system, and ground-water monitoring requirements) applicable to new surface impoundments, receive a variance from these requirements, or cease the receipt, storage or treatment of hazardous waste by November 8, 1988. The May 2, 1986, closure rule would require interim status surface impoundments that failed to meet MTRs by the November 8, 1988, deadline to close within 180 days, because November 8, by statute, would be the date of final receipt of hazardous waste for these units. Union Carbide and CMA, however, argue that the legislative history of HSWA explicitly indicates Congressional intent to allow disposal surface impoundments that stop receiving hazardous wastes to remain open and receive non-hazardous wastes after this deadline, even if they do not retrofit to satisfy the MTRs.

The legislative history of section 3005(j) of RCRA (130 *Cong. Rec.* S9182 (daily ed. July 25, 1984)) contains a brief discussion that indicates that the retrofitting requirements do not in themselves require the closure of an impoundment that ceases to receive hazardous wastes and that requiring such closure would not be proper if the management of the impoundment were protective of human health and the environment. In the preamble to the May 2, 1986, final rule, the Agency argued that, while the legislative history evidences that fact that section 3005(j) of RCRA itself does not mandate closure of an interim status surface impoundment that ceases to receive hazardous wastes, it leaves unimpaired EPA's pre-existing authority to establish by regulation additional closure requirements as necessary to protect human health and the environment. In other words, EPA concluded that the statute did not directly address the issue and did not constrain its discretion to promulgate closure regulations for surface impoundments subject to the retrofitting requirements. EPA concluded on a factual and policy-making basis that expeditiously closing hazardous waste surface impoundments after they stop receiving hazardous wastes was necessary to ensure protection of human health and the environment. The Agency primarily was concerned that, in certain circumstances, proper management of the facility might be continued which could lead to an increased possibility of releases and therefore risks to human health and the environment.

III. Synopsis of Proposed Rule

A. Rationale for Proposed Rule

Since the challenge to the May 2, 1986, final rule, EPA has been engaged in negotiations to settle the suit brought by Union Carbide and CMA. While no written settlement of this action has yet been signed, as a result of the discussions EPA now believes that it may not be necessary to require closure and termination of the receipt of nonhazardous wastes at all non-retrofitted surface impoundments. Under certain carefully controlled circumstances it may be possible for a nonretrofitted surface impoundment to continue to receive nonhazardous waste in manner that is protective of human health and the environment. EPA also believes that other types of land disposal units may be able to continue to accept nonhazardous wastes if they are similarly controlled. The types of controls that EPA deems necessary are discussed in detail in Part IV of this preamble.

There also are a number of sound policy reasons why it is desirable to allow units to delay closure to continue to receive nonhazardous waste, provided that it does not jeopardize protection of human health and the environment. First, the Agency is concerned that the existing closure deadlines could limit incentives for hazardous waste minimization. This would be inconsistent with the Ageny's overall policies and goals as well as Congressional intent expressed in HSWA. For example, a generator with on-site hazardous waste storage, treatment, or disposal capacity might refrain from recycling wastes or modifying production processes to eliminate the generation of hazardous wastes, if such actions resulted in specific units no longer receiving hazardous wastes. In this case, the current closure rules would require the closure of that unit, even if it had remaining capacity useful for the management of nonhazardous waste.

Second, the land disposal prohibitions may require that owners and operators of land disposal units stop using the units for the management of certain hazardous wastes, e.g., wastes containing banned solvents. As a consequence, these requirements might trigger closure of the units, even if capacity remains for managing other hazardous wastes or nonhazardous wastes in an environmentally protective manner. Finally, the closure regulations could act as a disincentive to the delisting of a waste stream, if such delisting resulted in a triggering of the closure requirements.

In all of these cases, the Agency recognizes that closure of the unit while the unit has remaining capacity to receive nonhazardous wastes could disrupt facility operations or impose substantial economic burdens on the facility owner or operator. This is particularly likely in the case of treatment impoundments (such as wastewater treatment units) that serve as an integral part of an industrial waste management system, providing management for both hazardous and nonhazardous waste streams. The Agency continues to believe that, in general, units that cease the receipt of hazardous wastes should initiate closure in accordance with Parts 264 and 265 standards. However the Agency believes that, under certain conditions, closure activities can be deferred without increasing the risks to human health and the environment. For example, landfills which meet the permitting requirements to manage hazardous wastes should pose few additional risks to human health and the environment provided added nonhazardous wastes are compatible with previously disposed hazardous

wastes. Today's proposal attempts to promote these policy goals while continuing to protect human health and the environment by establishing specific applicability requirements, environmental controls *and*, the continued application of Subtitle C requirements to units wishing to remain open after the final receipt of hazardous wastes to receive nonhazardous wastes.

The Agency therefore is proposing to allow units that cease the receipt of hazardous wastes to delay closure, so that they may remain open to receive nonhazardous wastes provided that they meet the requirements of today's proposal in addition to current Subtitle C regulations. EPA considers these requirements discussed below to be consistent with the full set of regulatory and legislative requirements currently in place for units or facilities that accept hazardous waste.

B. Summary of Proposed Rule

Today's proposal would allow an owner or operator of a permitted or interim status surface impoundment or landfill in compliance with applicable requirements to remain open following the final receipt of *hazardous* waste to receive only non-hazardous wastes, if he additionally satisfies the specific conditions being proposed today, and continues to conduct operations in accordance with all applicable Subtitle C interim status and permit requirements. The requirements included in today's proposal vary with the type of unit, with additional conditions imposed on surface impoundments that do not meet the Part 264 liner and leachate collection system requirements. In general, however, the facility owner or operator would be required to operate under full permit requirements of 40 CFR Part 264, including corrective action requirements. Facilities currently in interim status which meet the requirements of today's proposal may defer closure while the permit application is being reviewed. In addition, surface impoundments that did not meet the liner and leachate collection system requirements would be required to remove all hazardous waste, or, if hazardous waste were not removed, to close at the first indication of ground-water contamination.

Exhibit 1 shows requirements applicable to all owners or operators wishing to delay closure, regardless of the type of unit involved. The requirements for permitted and interim status facilities are basically the same; the differences are primarily procedural in nature. As Exhibit 1 illustrates, owners or operators wishing to keep units open would be required to seek a permit modification at least 120 days prior to the final receipt of hazardous wastes, or, for interim status facilities, to submit an amended Part B permit application (or a Part B application if not previously required) at least 180 days prior to the final receipt of hazardous wastes. (Owners or operators of units that received their final volume of hazardous wastes before the promulgation of this rule would be eligible to keep their units open if they submitted the appropriate demonstrations within 90 days after the notice of the final rule has been published in the **Federal Register**.)

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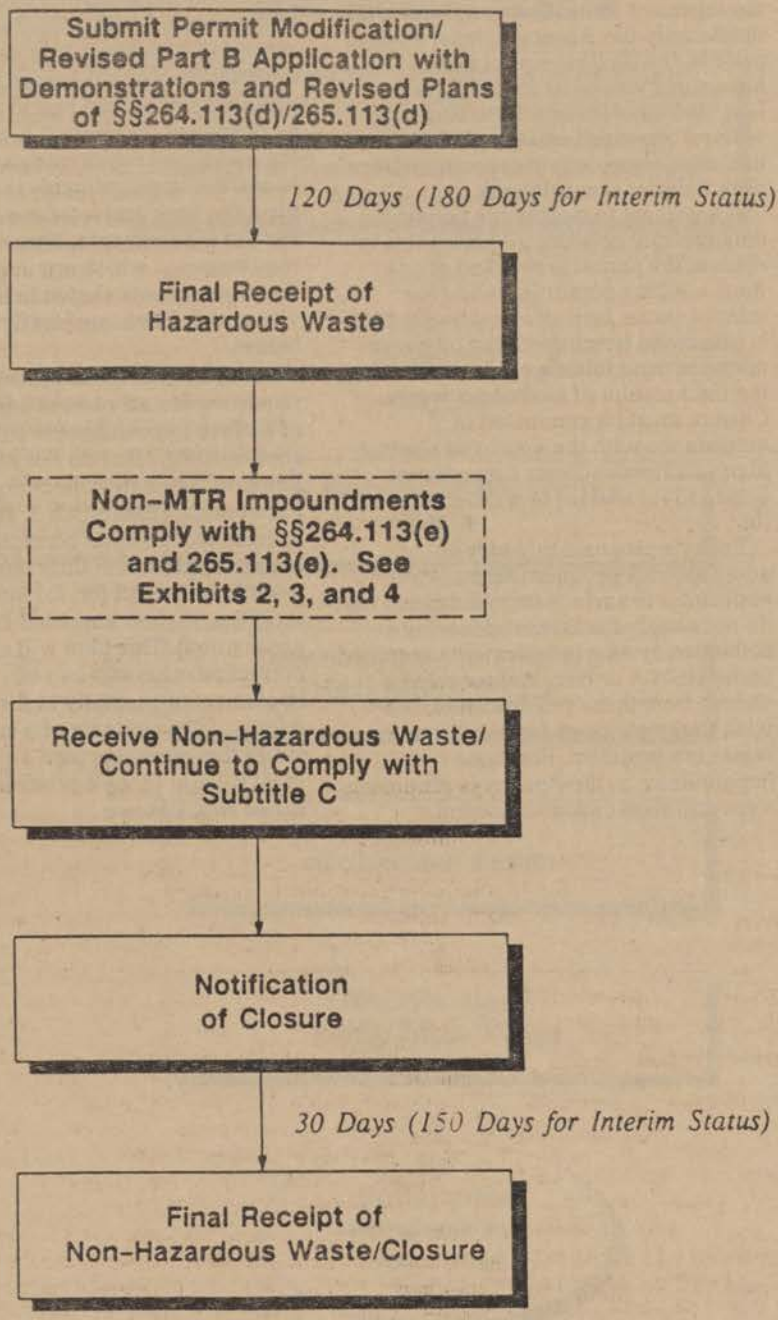
Exhibit 1

Requirements Applicable to All Facilities Wishing to Defer Closure



* Note: If a permit or permit modification is denied at any time, or interim status terminated for the affected unit, closure pursuant to §§ 264.113(a) and (b) or 265.113(a) and (b) must be initiated.

BILLING CODE 6560-50-C

The request for a permit modification or the amended Part B permit application must include a number of demonstrations, including ones showing that: (1) The unit has the existing design capacity to manage non-hazardous wastes; and (2) the non-hazardous wastes are not incompatible with any remaining wastes in the unit. As part of the permit modification or the amended Part B application, the owner or operator also must submit revised facility plans, including the waste analysis, ground-water monitoring, and closure and post-closure plans, and, if necessary, the closure and post-closure cost estimates and financial assurance to reflect changes associated with operating the unit to receive only non-hazardous wastes.

Owners or operators wishing to remain open following the final receipt of hazardous waste also must continue to comply with all Part 264 permit requirements (or Part 265 requirements until a permit has been issued), including ground-water monitoring and corrective action requirements and closure and post-closure care requirements. In addition, if the Regional Administrator determines that continued operation of the unit or facility will pose a substantial risk to human health and the environment, the unit would not be eligible to delay closure. Data collected pursuant to RCRA section 3019 and any other relevant information may be used by the Regional Administrator to make a determination of whether a substantial risk exists. Finally, units must be closed in accordance with the approved closure plan and the Subpart G regulations applicable to hazardous waste management units. Owners or operators must notify the Agency at least 30 days prior to the final receipt of non-hazardous wastes at that unit (or at least 150 days for interim status units without approved closure plans) and initiate closure activities in accordance with Subpart G regulations.

If a request to modify the permit to manage only non-hazardous wastes is denied, the permit is revoked at any time, a RCRA permit is denied for interim status facilities or interim status is otherwise terminated, the owner or operator must initiate closure following the final receipt of hazardous waste. Closure must be conducted in accordance with the approved closure plan and the deadlines currently in § 264.113 (a) and (b) or § 265.113 (a) and (b).

Today's proposal includes an additional set of requirements applicable to surface impoundments that do not satisfy the liner and leachate collection system requirements specified under HSWA or have not received a waiver from these requirements, but wish to remain open for non-hazardous waste management. For these impoundments, the Agency is proposing a combination of source control, accelerated corrective measures, and strict limitations on continued operations following the detection of a release to ground water. The Agency believes that compliance with these additional requirements and limitations when coupled with cessation of the receipt of hazardous wastes at these impoundments, will ensure the protection of human health and the environment. Exhibits 2, 3, and 4 show the additional requirements applicable to surface impoundments that do not meet the liner and leachate collection system requirements. These requirements, which are in addition to the requirements shown in Exhibit 1 and discussed above, are briefly summarized below.

In addition to these general requirements, all owners and operators of surface impoundments subject to section 3005(j) that do not satisfy the liner and leachate collection system requirement (Exhibits 2, 3, and 4) must provide a contingent corrective measures plan with their request to modify the permit (or, for interim status facilities, in their amended Part B permit application). This plan will ensure that corrective measures can be implemented promptly in the event of a release. (The contents of a contingent corrective measures plan are discussed in IV.B.2.a of today's preamble.)

BILLING CODE 6560-50-M

Exhibit 2

Surface Impoundment/Waste Removal Alternative with Release Detected Before/At Time of Final Receipt of Hazardous Waste

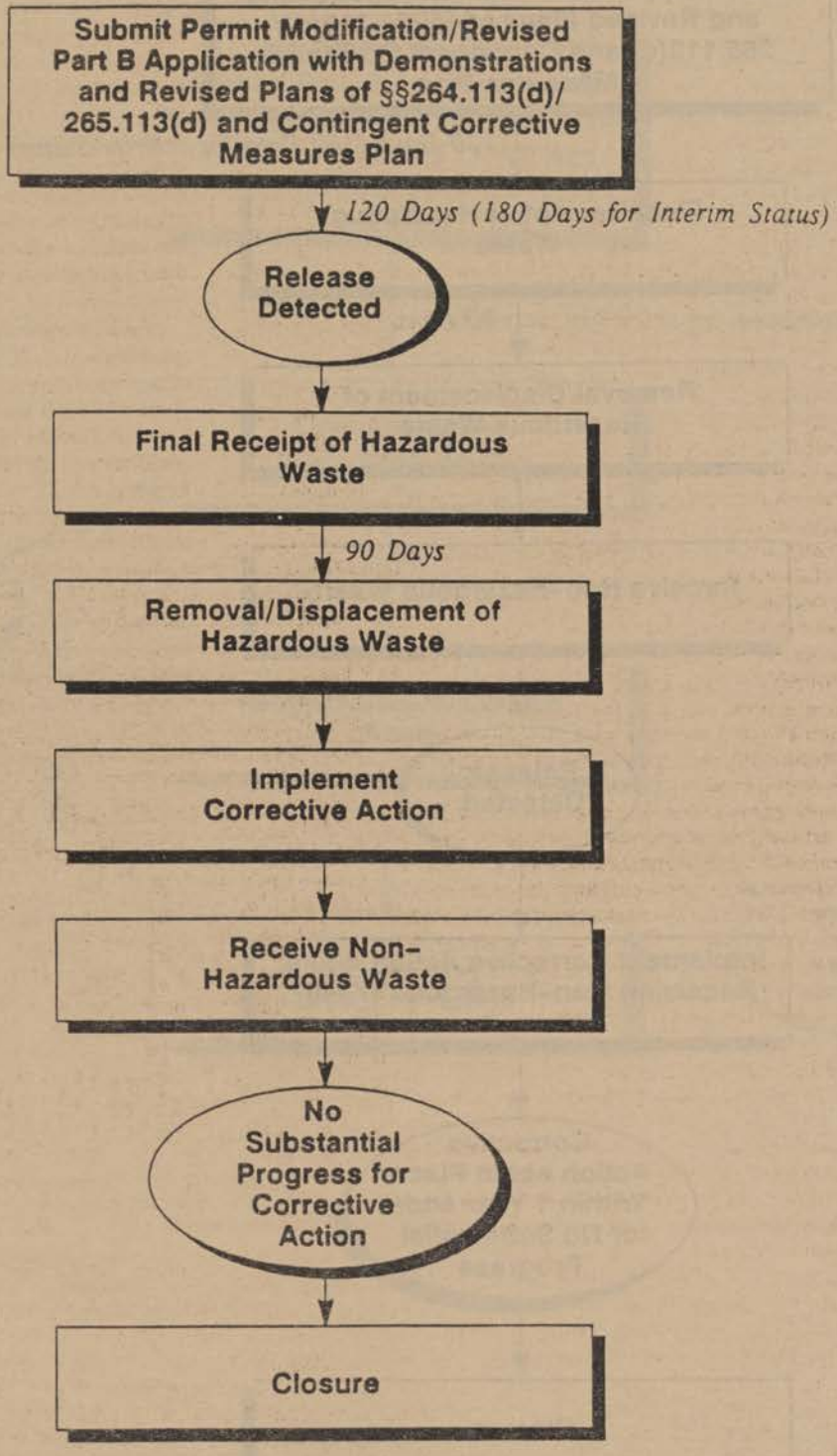


Exhibit 3

Surface Impoundment/Waste Removal Alternative with Release Detected After Final Receipt of Hazardous Waste

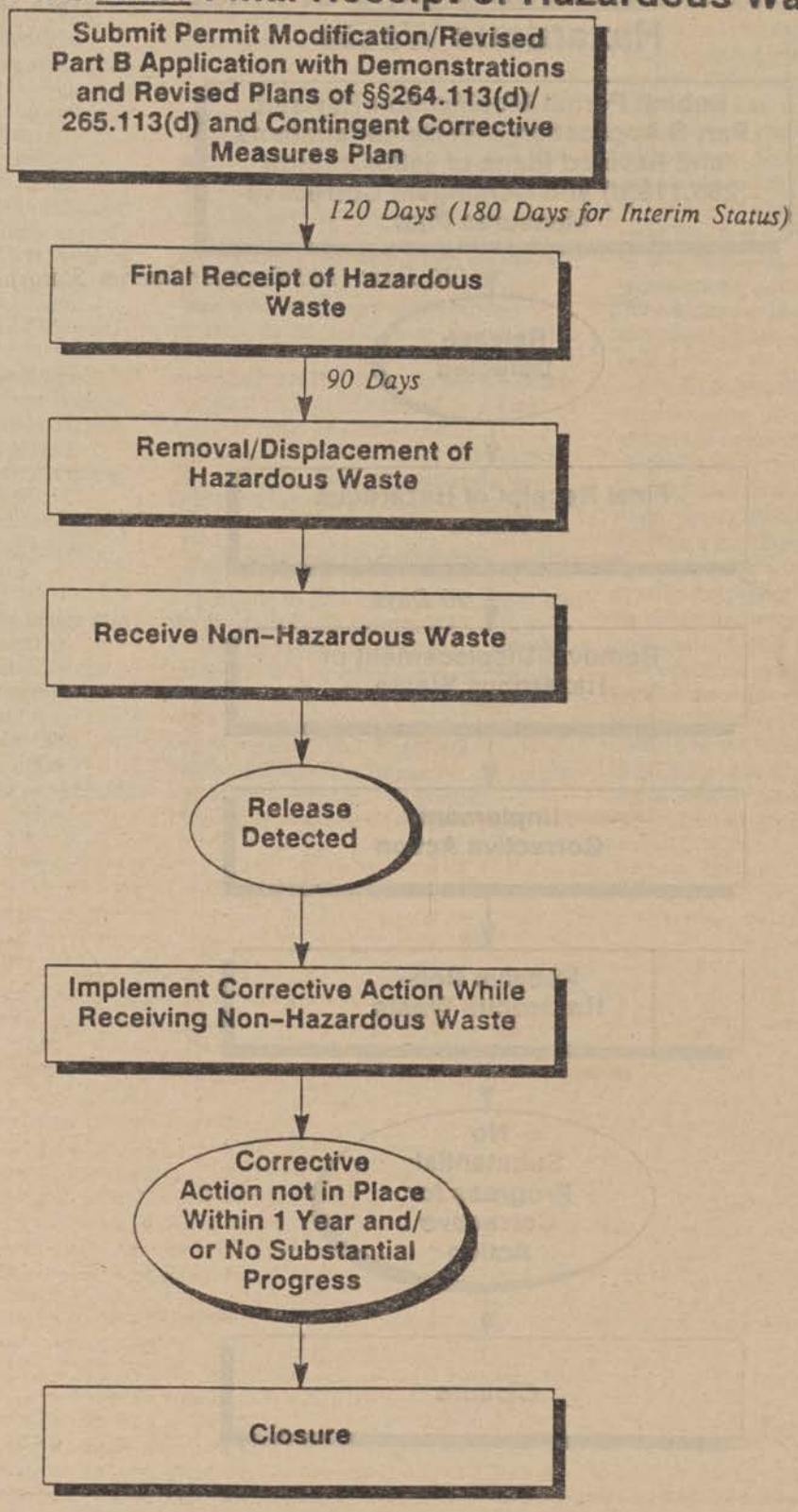
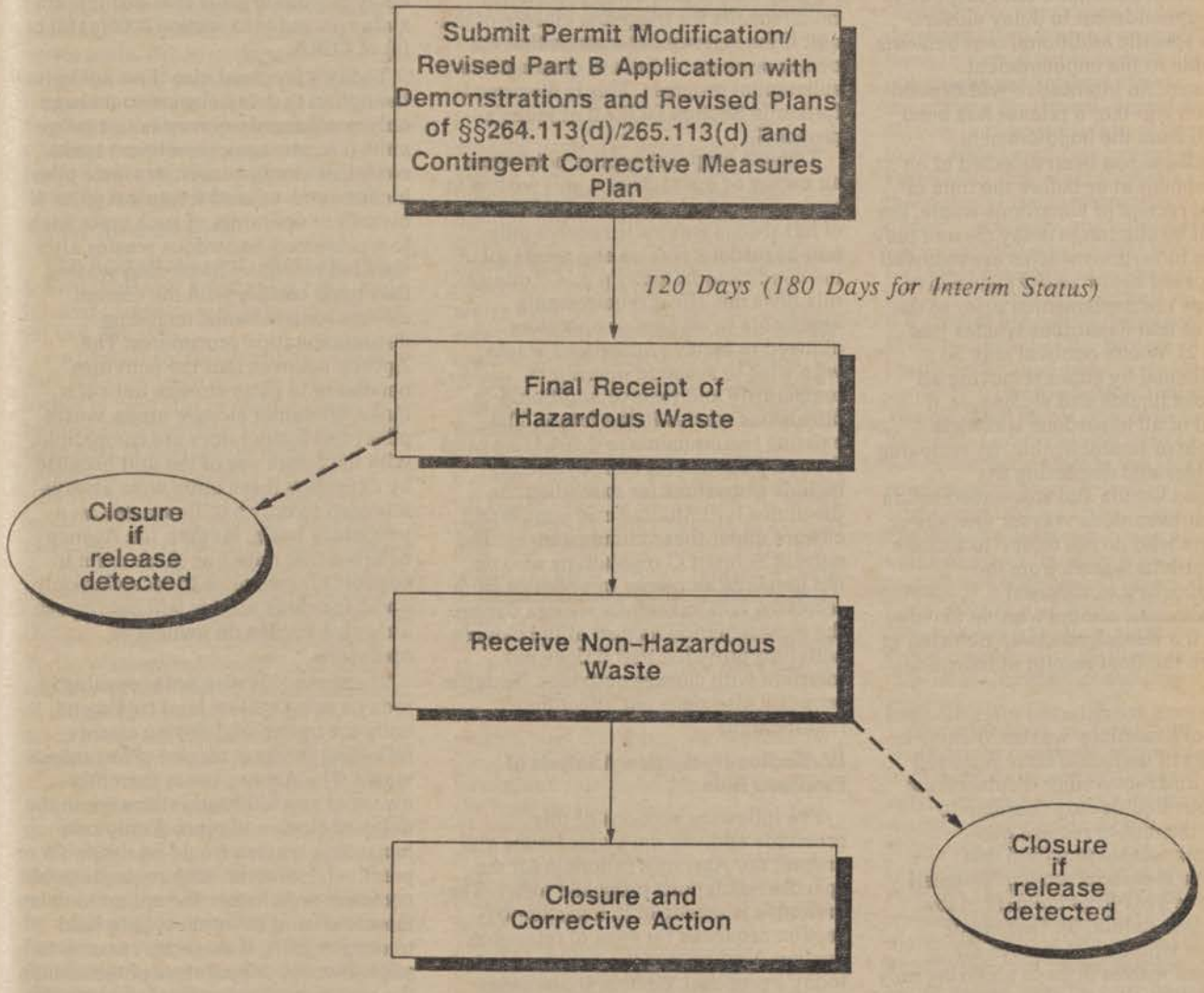


Exhibit 4

Surface Impoundment/Hazardous Wastes Remain Alternative



BILLING CODE 6560-50-C

With the submission of these initial demonstrations and contingent corrective measures plan, the owner or operator must indicate whether he intends to remove wastes from the impoundment or not. As summarized below and in Exhibits 2, 3, and 4, this decision will determine both eligibility of the impoundment to delay closure and the specific additional requirements applicable to the impoundment. Selection of an alternative will depend in part on whether a release has been detected from the impoundment.

If a release has been detected at an impoundment at or before the time of the final receipt of hazardous waste, the unit will be eligible to delay closure *only* if (1) the hazardous wastes are removed as discussed below *and* (2) corrective measures are implemented *prior* to the receipt of non-hazardous wastes (see Exhibit 2). Waste removal may be accomplished by either removing all hazardous liquids and sludges or, if removal of all hazardous wastes is infeasible or impracticable, by removing the sludges and displacing the hazardous liquids and suspended solids with non-hazardous wastes. Owners or operators who do not intend to remove the hazardous wastes from the impoundment (i.e., disposal impoundments) are not eligible to delay closure if a release has been detected at or before the final receipt of hazardous wastes.

If releases are detected *after* the final receipt of hazardous wastes, owners or operators of units that have removed sludges and removed or displaced the hazardous liquids may continue to operate the unit to receive non-hazardous wastes provided that corrective measures are implemented within one year from the date of the release (see Exhibit 3). Owners or operators who do not remove all hazardous wastes prior to receiving only non-hazardous wastes (i.e., disposal impoundments in Exhibit 4) must promptly initiate closure within 30 days of detection of the release in accordance with the deadlines in § 264.113(a) and (b) or § 265.113(a) and (b) if a release is subsequently detected.

Regardless of when the release is detected, the owner or operator must begin closure if he fails to make substantial progress in implementing the corrective measures and achieving the ground-water protection standard (or background levels for facilities that have no established ground-water protection standard). Substantial progress will be determined on a case-by-case basis. In general, however, the achievement of substantial progress will be measured by whether the owner or operator has met significant deadlines in the compliance schedule, permit, or enforcement order that establishes timeframes for achieving the facility's ground-water protection standard or background levels, if applicable. The Agency also is proposing procedural requirements for triggering closure of the unit if the Agency determines that the owner or operator fails to demonstrate substantial progress. This is discussed further in Section IV.B.2.d of today's proposal.

Today's proposal applies only when an owner or operator of a unit wishes to remain open following the final receipt of hazardous wastes to receive only non-hazardous wastes and meets all of the conditions in today's rule. Today's rule does not affect requirements applicable to owners or operators allowed to receive *hazardous* waste who wish to suspend operations temporarily and receive additional *hazardous* wastes in the future. The existing requirements in § 264.113(a) and (b) and § 265.113 (a) and (b) already include provisions for extending the deadlines for initiating and completing closure under these circumstances. The current Subpart G regulations also do not preclude an owner or operator from receiving non-hazardous wastes during the closure period as part of the closure activities provided that it does not interfere with closure activities. Today's proposal also does not affect these requirements.

IV. Section-by-Section Analysis of Proposed Rule

The following sections of this preamble address the major issues and present the Agency's rationale for the specific regulations proposed today. The preamble is arranged in a section-by-section sequence for ease of reference. Section A addresses the applicability of today's proposal. Section B discusses the Part 264 technical requirements applicable to permitted facilities, while the Part 270 procedural requirements applicable to permitting are addressed in Section C. Section D discusses the conforming changes to Parts 264 and 265 interim status standards. The requirements proposed in Parts 264 and 265 are substantively identical, but have slightly different procedural requirements.

A. Applicability

Today's proposal is restricted to permitted and interim status landfill and surface impoundment units that: (1) Are in compliance with applicable permit or interim status requirements; (2) cease to receive hazardous wastes; *and* (3) will subsequently receive only non-hazardous waste. For a unit to qualify as no longer receiving hazardous wastes, no additional hazardous wastes or wastes that generate a hazardous waste, shall be placed in the unit.[1] Today's proposal does not extend the option to delay closure to units that lost interim status pursuant to section 3005(e) (2) or (3) of RCRA.

Today's proposal also does not extend the option to delay closure to manage only non-hazardous wastes to storage units (i.e., storage or treatment tanks, container storage areas, or waste piles), incinerators, or land treatment units. If owners or operators of such units wish to receive non-hazardous wastes after the final receipt of hazardous wastes, they must comply with the current closure requirements, including decontamination procedures. The Agency believes that the activities necessary to close storage units (i.e., tanks, container storage areas, waste piles) and incinerators are compatible with the future use of the unit because by definition these units were always intended to only handle wastes on a temporary basis. Further, the Agency believes that requiring these units to conduct closure prior to receiving only non-hazardous wastes will not impose an undue burden on owners or operators.

The Agency is also not proposing in today's rule to allow land treatment units the option of delaying closure following the final receipt of hazardous waste. The Agency is not currently aware of any likely situations when the delay of closure to receive only non-hazardous wastes would be desirable or practical. However, EPA requests public comment on whether the option to delay closure should be applicable to land treatment units. If there are reasons to allow owners or operators of these units the option to remain open following the final receipt of hazardous wastes to receive only non-hazardous wastes, they would become subject to the requirements proposed in §§ 264.113(d) or 265.113(d), including demonstrations that the management of non-hazardous wastes in the land treatment unit will not be incompatible with any prior hazardous waste management

[1] For example, when a non-listed rinsewater from an electroplating operation is discharged into a surface impoundment, a listed wastewater treatment sludge from electroplating operations is formed in the impoundment. While the waste that enters the impoundment is non-hazardous, a listed hazardous waste is generated and thus received in the impoundment. Therefore, this unit would not qualify as a unit no longer receiving hazardous wastes.

operations. Owners or operators also would continue to be subject to all applicable Parts 264 or 265 requirements under Subpart M, including the treatment demonstration requirements in § 264.272.

EPA also requests comments on whether the closure delay option offered to landfills and surface impoundments should be extended to other hazardous waste units. We also request comment on the types of requirements that would be appropriate for other types of units seeking to delay closure in order to change to non-hazardous waste operations after the final volume of hazardous waste has been received.

B. Part 264 Standards

The Agency is proposing to amend § 264.112(d) and § 264.113 (a), (b), and (c), and to add new paragraphs (d) and (e) to § 264.113.

As previously discussed, the current Part 264 standards require a facility owner or operator to treat, dispose of or remove all hazardous wastes within 90 days (264.113(a)) and to complete closure activities within 180 days (264.113(b)) of the last receipt of hazardous wastes. Further, 264.112(d) establishes that the date that the owner or operator expects to begin closure, and therefore must notify EPA, is no later than 30 days after the receipt of the last known volume of hazardous wastes. Today's amendments will provide an additional justification for an extension of the closure period to allow for management of only non-hazardous wastes. Additionally, a conforming change is being made to § 264.112(d) to address final closure of units that qualify for this new closure extension.

The changes to § 264.113 supplement the existing general facility and technology-specific Part 264 standards by adding a separate set of requirements for owners or operators of hazardous waste management units that will delay closure in order to remain open to manage solely non-hazardous waste stream(s). These requirements are proposed to provide assurance that public health and the environment will be adequately protected at these units during the period prior to closure. All owners or operators wishing to delay closure are required to apply for a modification of their facility operating permits. This permit modification request must be accompanied by certain demonstrations and amended facility plans. Procedures for requesting a permit modification to delay closure, including timing requirements, are discussed in Section III.C of this preamble. Additional requirements are proposed in § 264.113(e) for surface impoundments that do not meet the liner and leachate collection system requirements in Part 264. Surface impoundment units will be subject to proposed §§ 264.113 (d) and (e) whereas landfill units will be subject to proposed § 264.113(d) only. The owner or operator must also continue to comply with existing Part 264 permit requirements.

1. General Conditions for Delay of Closure

Today's proposed rule imposes additional requirements on units wishing to remain open after the final receipt of hazardous wastes. These requirements supplement existing Subtitle C requirements. Under today's proposal an owner or operator must comply with all other applicable Part 264 requirements, including ground-water monitoring and corrective action requirements. Additional requirements are discussed below and in Section IV.B.2. A discussion of deadlines for complying with these requirements is in Section IV.C.

a. *Demonstrations for Extensions to Closure Deadlines.* Proposed §§ 264.113 (d) and (e) specify the conditions which must be met to delay closure to manage only non-hazardous wastes. First, the owner or operator must request a permit modification and, under § 264.113(d)(1) make a series of demonstrations. Sections 264.113(d)(1) (i) and (ii) propose that the owner or operator demonstrate that the unit has existing design capacity to receive non-hazardous wastes, and that there is a reasonable likelihood that the unit will receive non-hazardous wastes within one year after the final receipt of hazardous wastes. These demonstrations are consistent with the demonstrations currently required in §§ 264.113 (a) and (b) to extend the closure deadlines if an owner or operator wishes to suspend hazardous waste management operations temporarily and recommence receiving hazardous wastes at a later time.

Design capacity as specified in these sections refers to the operational design capacity included within the facility's Part A application. Since a primary purpose of the proposed rule is to allow facility owners and operators with existing waste disposal capacity to use this capacity effectively, the Agency does not believe that facilities should be allowed to expand their design capacity to accommodate even greater amounts of wastes.

In addition, to ensure that use of the unit to manage non-hazardous waste is protective of human health and the environment, the Agency is proposing to require in § 264.113(d)(1)(iii) that owners or operators must demonstrate that treatment, storage, or disposal of non-hazardous waste (including the interaction between non-hazardous wastes that may be co-managed) will not pose any potential threats to human health and the environment as a result of past and existing hazardous waste management operations. In this demonstration, owners or operators would be required to consider fully any potentially detrimental effects concerning the design, operation, closure, and post-closure of the unit due to the addition of non-hazardous wastes. Potentially detrimental effects include those due to the incompatibility of non-hazardous wastes and constituents with the hazardous wastes that previously had been disposed of in the unit. For example, detrimental effects might occur if a neutral pH metallic sludge (listed as F006) remained at the bottom of a unit that received non-hazardous waste containing relatively high acid levels. The elevated levels of acid in the non-hazardous waste would tend to solubilize the metals in the F006 sludge, resulting in a leachate with potentially significant levels of toxic metals. Potential problems that may affect a unit's ability to comply with Subtitle C requirements also must be addressed. For example, at a landfill the impacts of adding non-hazardous wastes may include subsidence, settlement of the cap, or leachate or methane gas generation.

In many cases, especially for wastewater treatment impoundments, both hazardous and non-hazardous waste streams will have been previously managed simultaneously in the unit and compatibility of operations should be relatively easy to demonstrate to the Agency. On the other hand, EPA does not believe, for example, that receipt of municipal solid waste at a landfill previously used to manage hazardous waste would ever be considered compatible given the potential for the generation and migration of methane gas, subsidence, and settling of the cap.

As discussed below, the proposal requires that the unit continue to comply with all RCRA Subtitle C permit conditions. Because a unit or facility that delays closure is handling non-hazardous wastes, such facilities may be subject to State laws regulating the management of municipal or industrial solid wastes. Therefore, the Agency expects owners and operators to conduct management of the non-hazardous wastes in a manner consistent with any applicable State and local requirements for facilities that handle non-hazardous wastes.

Finally, §§ 264.113(d)(1) (iv) and (v) require owners and operators to demonstrate that closure of the unit is incompatible with its continued operation and that the unit is (and will continue to be) in compliance with all applicable permit requirements. These requirements are consistent with current requirements for approval to extend the closure period under §§ 264.113 (a) and (b). In reviewing compliance with applicable regulations, the Agency is concerned that ground-water systems pursuant to § 264.97 be in place. The Agency in particular would expect facilities delaying closure under today's proposal to have monitoring wells in place as required by Subpart F.

b. *Changes to Facility Plans.* The Agency is proposing in § 264.113(d)(2) to require as a condition of delaying closure that owners or operators submit, with their permit modification, a request to make the appropriate changes to the waste analysis, ground-water monitoring and response, and closure and post-closure plans, and associated changes to the closure and post-closure cost estimates and financial assurance required elsewhere in Part 264. Just as facility plans must be revised to reflect substantial changes in the types of *hazardous* wastes handled or the hazardous waste management practices employed, the Agency believes that selected plans for the facility, and, in particular, the waste analysis plan, ground-water monitoring plan, and closure and post-closure plans and cost estimates, may have to be modified to reflect the changes associated with operation of the unit to receive only non-hazardous wastes.

The ground-water monitoring plan may also need to be revised to account for the presence of any hazardous constituents, such as those published in Appendix VIII of Part 261 or Appendix IX in Part 264, in the non-hazardous waste. In addition, at some facilities it may be necessary to revise the ground-water monitoring plan to address the installation of additional wells for those units that will be remaining open to receive only non-hazardous wastes in order to detect releases from those units. Revisions to the closure and post-closure plans may be necessary if the activities to be conducted differ from those previously planned (e.g., procedures for handling wastes at closure or the date of final closure, if required under § 264.112(b)(7)). To the extent that revisions to the closure or post-closure care plans increase the cost estimates, the cost estimates and the amount of financial assurance required in §§ 264.143 and 264.145 also must be increased.

c. *Exposure Assessment Information.* Under proposed § 264.113(d)(4), owners or operators of landfills and surface impoundments must include the human exposure assessment required under RCRA section 3019(a). Facilities will not be eligible to delay closure to receive non-hazardous waste if the Regional Administrator determines that the unit poses a substantial risk to human health. Such a determination will be based on data from the human exposure assessement, as well as on any other relevant information. Upon determination that a unit poses a substantial risk to human health, the unit will be required to close following the final receipt of hazardous wastes pursuant to the current deadlines in Subpart G.

d. *Permit Revisions.* Finally, the Agency is proposing in § 264.113(d)(5) to require that the request to modify the permit include revisions as appropriate to affected conditions of the permit to account for the management of only non-hazardous waste in a unit previously managing hazardous waste. Because some hazardous constituents may remain in a unit even in cases where hazardous wastes have been flushed or removed, the Agency believes that it is important for the protection of human health and the environment that information concerning the management of non-hazardous waste be included in the permits of facilities seeking to delay closure under today's proposal. In addition, this requirement is consistent with the Agency's intent that units delaying closure continue to be subject to the permitting requirements of Subtitle C. Receipt of non-hazardous waste under today's proposal, therefore, would be considered analogous to adding a hazardous waste stream to a facility during its normal operating life. Permit revisions that the Agency would consider necessary include revisions to the exposure information required under § 270.10(j) to account for the potential danger to the public due to the continued presence of hazardous constituents in the unit following the final receipt of hazardous waste. A list of the non-hazardous wastes to be managed as required for hazardous waste under §§ 270.17(a) and 270.21(a), and revised descriptions of the processes to be used in the unit for treating, storing, and disposing of wastes as required under § 270.13(h)(i) would also be required. Other required revisions might include an updated demonstration of financial assurance as required under § 270.14(b)(15) and a revised ground-water monitoring plan as required under § 270.14(c)(5) and discussed in Section IV.B.1.b above.

2. Surface Impoundments that Do Not Meet Liner and Leachate Collection System Requirements

Congress has recognized that surface impoundments may pose certain waste management problems as evidenced by the provisions of RCRA section 3005(j), which state that interim status surface impoundments in existence on November 8, 1984, must either satisfy the MTRs applicable to new units (i.e., be designed with double liners, leachate collection systems, and ground-water monitoring), receive a waiver from these requirements, or stop the receipt, storage, or treatment of hazardous wastes by November 8, 1988. These requirements are discussed in the March 28, 1986 **Federal Register** (See 51 FR 10707).

Because of this additional concern for surface impoundments that do not meet the MTRs, and Agency believes that controls beyond those already discussed above must be imposed on these units as a condition of delaying closure to receive only non-hazardous wastes where some hazardous wastes are to remain in the unit. For surface impoundments that othrewise satisfy the permit requirements (including compliance with Subpart F ground-water monitoring) but do not meet liner and leachate collection system requirements, EPA believes that additional controls are necessary to ensure that such units delaying closure under today's proposed rule afford a level of protection consistent with that of units that are retrofitted to meet these requirements. Although these units are no longer receiving additional hazardous wastes, hazardous wastes (e.g., sludges) from previous operations may be present in the unit. Because of the potential presence of hazardous wastes in these impoundments, continued operation of the units for any waste management is concern due to the likelihood of leakage, especially from unlined units. Therefore, today's rule proposes that all surface impoundments that do not comply with double liner and leachate collection system requirements in Part 264 applicable to new units and RCRA section 3005(j) must submit not only the required demonstrations and the modified facility plans discussed above, but also comply with additional requirements in § 264.113(e) to ensure protection of human health and the environment. These requirements are discussed below.

a. *Contingent Corrective Measures Plan.* In addition to the demonstrations and requirements described in IV.B.1 above, proposed § 264.113(e)(1) requires owners or operators of surface impoundments that do not satisfy liner and leachate collection system requirements to submit a contingent corrective measures plan with the request to modify the permit as a condition of delaying closure unless a corrective action plan has already been submitted under § 264.99. (The requirements for initiating corrective action are discussed further in today's preamble at IV.B.2.c below.) Requiring this plan in advance of a release will ensure that if a leak does occur, corrective measures can be implemented quickly to prevent further contamination of ground water, contain existing contamination, and lead to steady progress in achieving the ground-water protection standard at the unit.

The Agency expects such a plan to include as many elements of a full corrective action program as possible and to be sufficiently detailed with respect to actual remedial activities to ensure rapid implementation in the event of a release. Because the exact extent and type of release will not be known, the contingent corrective measures plan should describe a range of possible remedies that may be appropriate under several likely release scenarios. While the Agency recognizes that it would be impossible to plan for all contingencies, EPA believes that, using data on the types of constituents at the facility, hydrogeologic conditions, location of ground-water monitoring wells, and available remedial technologies, it is possible to develop a fairly detailed set of alternative measures.

The plan should include an extrapolation of future contaminant movement, a discussion of the likely contaminants of concern, and a description of those corrective measures that can be installed quickly to address *inter alia* releases of different types of constituents or releases at variable rates and plumes of different size and depth. The plan should also identify potential interim measures such as alternate water supplies, stabilization and repair of side walls, dikes, and liners, or reduction of head, if appropriate. The range of corrective measures should be described in detail, including the equipment and the physical components required. For example, the plan should describe the type and placement of the containment measures to be used (e.g., slurry walls, low permeability barriers, etc.), the number and types of wells and how they will be used (e.g., diversion wells or wells for collecting the flow), and the proposed treatment technologies (e.g., carbon adsorption, ion exchange, chemical precipitation, etc.). The plan should also identify any site-specific problems which could affect a corrective measures program, such as underground utilities and migration of the plume under structures.

The Agency believes that much of the data for the contingent corrective measures plan should be readily available to owners or operators. Information on constituents, plume direction, location of wells, and potential human and environmental exposures is included with the Part B permit application. Additional information may also be available as a result of actions taken or ongoing to comply with corrective action requirements under either Subpart F or a RCRA section 3008(h) corrective action order or permit conditions pursuant to RCRA section 3004(u).

The preparation of the contingent corrective measures plan does not relieve the owner or operator of any existing or future requirements of a corrective action program or schedules of compliance in a RCRA section 3008(h) corrective action order. The measures identified in the contingent corrective measures plan are anticipated to be complementary to any long-term corrective measures that may be determined to be required following more in-depth analysis of the release and remedy evaluation. Changes to the contingent plan may be made under applicable permit modification requirements.

b. *Alternatives.* Today's proposal in section 264.113(e) offers owners or operators of surface impoundments that do not satisfy the double liner and leachate collection requirements three alternatives for delaying closure to receive non-hazardous wastes. These options offer flexibility to owners or operators to account for different types of management practices. However, regardless of the option chosen, the combined requirements are designed to assure that impoundments that do not meet double liner and leachate collection system requirements ensure protection of human health and the environment. As part of the demonstrations required in the request to modify the permit to delay closure, an owner or operator of a surface impoundment eligible to delay closure must include a plan for complying with one of the three alternatives described below.

(1) *Alternative 1—Removal of Hazardous Wastes.* Under the first alternative, proposed in section 264.113(e)(2)(i), an owner or operator of a surface impoundment must remove all hazardous liquids and hazardous sludges from the impoundment prior to the receipt of nonhazardous waste. In addition, in the event of a release to ground water, the facility would have to comply with the corrective action requirements discussed in Section IV.B.2.c below.

The Agency recognizes that for lined units, it may be necessary to leave some wastes immediately above the liner to avoid impairing the integrity of the liner. Therefore, the Agency is proposing to allow sludges to remain immediately above the liner *only* to the extent necessary to maintain the integrity of the liner. In cases where the unit is unlined, the hazardous waste must be removed down to the underlying and adjacent soil. This degree of removal will maintain the structural uniformity of the bottom of the unit. The amount of hazardous sludge that must be removed will be determined on a case-by-case basis, taking into consideration the physical and chemical characteristics of the sludge, technology available to remove the sludge, and liner material.[2] The Agency will not consider the economic practicability of sludge removal in determining the amount of sludge that must be removed. At the time of final closure, the impoundment will still be subject to Subpart G closure requirements. If the unit chooses to "clean close", additional sludge removal may be required to meet clean closure standards. This final determination will be made at the time of final closure.

As specified in proposed § 264.113(e)(4)(i), the hazardous wastes (liquids and sludges) must be removed no later than 90 days after the final receipt of *hazardous* wastes. The Regional Administrator may approve a request for a longer period of time based on need (e.g., additional time is required because of adverse weather conditions or specific operating practices), and a demonstration that an extension will not pose a threat to human health and the environment. (The requirement to remove wastes as a condition of delaying closure applies only to the

[2] The draft RCRA Guidance Document, "Minimum Technology Guidance on Single Liner Systems for Landfills, Surface Impoundments, and Waste Piles—Design, Construction, and Operation," issued may 24, 1985, for example, suggests that a minimum of 18 inches of protective soil or equivalent is appropriate to protect liners from damage when mechanical equipment is used to remove sludge or contents of the impoundment.

hazardous wastes in the impoundment.) The deadline and the criteria for requesting an extension to the 90-day deadline are consistent with the current provisions in § 264.113(a) for removing all *hazardous* wastes at closure and for requesting an extension to that deadline. The Agency wishes to ensure that owners or operators of surface impoundments that do not satisfy the double liner and leachate collection system requirements and who choose to remove hazardous wastes do so within the same time frames were they to close their units following the final receipt of *hazardous* wastes.

(2) *Alternative 2—Flushing Hazardous Wastes*— (a) *Sludge Removal and Flushing of Liquids.* The second alternative, proposed in § 264.113(e)(2)(ii), would allow an owner or operator to delay closure if he removed the hazardous sludges as required in Alternative 1 (e.g., dredging or pumping) and removed the liquid hazardous wastes and suspended solids from the unit by flushing the unit with the non-hazardous influent. This alternative is available only where the owner or operator can demonstrate that it is infeasible or impracticable to remove all of the hazardous waste from the impoundment as discussed in Alternative 1. The owner or operator also would be required to demonstrate that the liquid wastes and suspended solids remaining in the unit did not exhibit a characteristic of hazardous wastes identified in Subpart C of Part 261. As in Alternative 1, the owner or operator also must comply with corrective action requirements discussed below.

The Agency believes that units employing biological treatment methods may be able to demonstrate that it is infeasible or impracticable to remove all of the hazardous wastes as discussed in Alternative 1. In a biological treatment impoundment, the hazardous wastes of concern include the sludge that has settled to the bottom of the unit and the liquid phase. If the hazardous liquids are removed by draining the impoundment, the following problems could arise. First, in many cases the facility's wastewater treatment system would be shut down, which could force the facility to stop some of its operations for a significant period of time while the removal activities were completed. Second, the microorganisms which had been acclimated to the facility's wastes would be destroyed and the facility would have to reacclimate a new biomass.

Under Alternative 2, at least 95 percent of the liquid and suspended hazardous wastes must be displaced by flushing with non-hazardous influent. The owner or operator must demonstrate that 95 percent of the liquid, as measured by volume, has been displaced. The Agency would consider a tracer study to be an appropriate means of making this demonstration. For example, in some impoundments, depending on the waste types and the environment, a radioisotope (e.g., deuterated marker compounds) or an easily detected and identifiable chemical compound could be introduced into the impoundment, allowing the wastes remaining in the impoundment to be measured. Use of chemical dyes to trace the flow of wastes also may be appropriate methods in some circumstances.

As specified in § 264.113(e)(4)(ii), the owner or operator must begin flushing the impoundment and removing hazardous sludges no later than 15 days after the final receipt of hazardous wastes and complete the 95 percent displacement and removal of hazardous wastes no later than 90 days after the final receipt of hazardous wastes. This deadline is consistent with the deadline in § 264.113(a) for removing hazardous wastes at closure. For multi-unit treatment impoundments, 95 percent of the hazardous wastes in the last unit in the train must be displaced no later than 90 days after the final volume of hazardous wastes has been received at the first unit. The Regional Administrator may grant an extension to the 90-day deadline if the owner or operator can demonstrate that the retention time necessary to flush the unit or remove all of the sludge necessitates a longer time period and that an extension will not pose a threat to human health and the environment.

The Agency recognizes that the retention time necessary to complete the 95 percent displacement will vary significantly among units, depending on site-specific factors such as size, depth, average flow rate, and the type of treatment that is being conducted (e.g., aerobic, anaerobic, aeration, settling, facultative). The Agency believes that a 90-day deadline should be sufficient for all but the largest impoundments or for multi-unit treatment impoundments. Data on the average retention time for a number of different sizes and types of impoundments suggest that only very large impoundments (e.g., 200-acre impoundments) or treatment train impoundments comprised of several units are likely to have retention times of over 90 days. Most of the impoundments examined had average retention times of less than 50 days, suggesting that displacement and sludge removal could be completed within the proposed deadline. For units that cannot complete the displacement within the 90-day deadline, the Agency would have the authority to extend the deadline. To support an extension, EPA would expect an owner or operator to submit data on the size of the unit, the type of treatment being conducted, the average flow rate (e.g., millions of gallons per day), and documentation supporting the claim that the unit's retention time and the time required to remove the sludge would exceed 90 days.

The Agency recognizes that the 90-day deadline also may be insufficient for treatment facilities composed of multiple impoundments. For example, a treatment system comprised of an equalization pond, two anaerobic ponds, and an aerobic pond could have a combined retention time exceeding 90 days. In this case, the Agency would entertain a request for an extension of the 90-day deadline.

The Agency considered proposing that the flushing process be completed within 180 days to allow owners or operators of very large impoundments sufficient time to remove the sludges and complete the flushing process. The Agency was concerned that owners or operators not delay the flushing process and, as a result, is proposing that the flushing begin no later than 15 days after the final receipt of hazardous wastes and be completed no later than 90 days after the final receipt. The Agency is requesting comments on whether 90 days is an adequate amount of time to complete the sludge removal and flushing process for most facilities and data on retention times of impoundments to support an alternative deadline, if appropriate.

(b) *Relationship to Mixture Rule.* EPA's "mixture rule" for the definition of hazardous wastes raises an interesting issue for facilities that treat hazardous wastes in a series of connected surface impoundments. Under the requirements of 40 CFR 261.3(a)(2)(iv), where a listed hazardous waste mixes with a non-hazardous waste, the entire mixture is considered to be the listed waste and must be handled as hazardous. Such mixing might occur in a surface impoundment that is delaying closure to receive non-hazardous wastes under any of the three alternatives described above. If the impoundment in which the mixing occurred was the first impoundment in a treatment train, the material it discharged to "downstream" impoundments would be considered a hazardous waste. The "downstream"

impoundments would have to retrofit to continue to receive this mixed hazardous waste stream after November 8, 1988.

Retrofitting, however, might not be required in all circumstances. The key question would be whether in fact any mixing of non-hazardous and hazardous wastes occurs in the first impoundment in the series. The Agency has stated, in somewhat analogous circumstances, that no mixing occurs in a wastewater treatment unit that manages a non-hazardous liquid waste even if that liquid generates a hazardous sludge that settles to the bottom of the same unit, unless the sludge is in some way physically dredged up and mixed with the liquid. EPA believes it would be appropriate to apply the same principle here. There should be even less opportunity for mixing here because in many cases much of the original hazardous sludge will be removed, and in all cases no additonal quantities of hazardous sludge will be generated. Consequently, if there is no further disturbance of remaining hazardous waste in an impoundment delaying closure, EPA will presume that no mixing occurs and that the non-hazardous waste does not become a hazardous waste. Subsequent surface impoundments would be able to accept this non-hazardous waste if they met the requirements proposed today.

Final closure activities, of course, may disturb and mix the wastes and as previously discussed, the hazardous waste rules apply at final closure. Sludges within all impoundments continue to be considered hazardous wastes unless delisted.

(3) *Alternative 3—Leaving Hazardous Wastes in Place.* The third alternative proposed in § 264.113(e)(3) allows owners or operators of disposal impoundments who do not intend to remove all hazardous wastes, including liners and contaminated soils, at closure, but instead will leave some hazardous wastes in place, to delay closure under only limited circumstances. Because hazardous wastes are not removed prior to the receipt of non-hazardous wastes, the Agency is proposing more stringent requirements for disposal impoundments than for impoundments at which hazardous wastes are removed. For disposal impoundments, the Agency is limiting the availability of the option to delay closure to those impoundments that do not have a statistically significant increase over background values of detection monitoring parameters or constituents or have not exceeded the facility's ground-water protection standard at the point of compliance on the date of the final receipt of hazardous wastes. This determination will be based on the most recent monitoring data as required in Part 264 Subpart F. In addition, if a release is detected after the final receipt of hazardous wastes, the owner or operator must promptly initiate closure of the disposal impoundment in accordance with the approved closure plan no later than 30 days after the detection of the release and comply with the corrective action requirements including those discussed below.

c. *Corrective Action Requirements.* All units that delay closure will remain subject to all applicable corrective action requirements. In addition, owners or operators of surface impoundments that do not meet the double liner and leachate collection system requirements must submit a contingent corrective measures plan as a condition of delaying closure. The Agency is proposing in § 264.113(e) additional conditions that apply if there is a statistically significant increase over background values of detection monitoring parameters or constituents for interim status units or if a release that exceeds the facility's ground-water protection standards at the point of compliance is detected at these impoundments. This determination will be made based on the unit's most recent monitoring data as required under Part 264 Subpart F. The purpose of the contingent corrective measures plan and the corrective action requirements in § 264.113(e) is to ensure that if a release is detected, interim corrective measures, at a minimum, are instituted quickly.

As mentioned earlier, the corrective action requirements proposed in § 264.113(e) have no effect on an owner's or operator's obligations to comply with all of the requirements in Part 264, Subpart F. Rather, the requirements in today's proposal are in addition to the corrective action requirements specified in Subpart F to ensure that the delay of closure to receive only non-hazardous wastes at surface impoundments that do not meet the double liner and leachate collection system requirements does not compromise the protection of human health and the environment. Moreover, the Regional Administrator retains the authority to require additional corrective measures as deemed necessary in the final corrective action plan. Finally, today's proposal will not affect future changes to Subpart F that are currently under consideration. For example, if the Agency revises the methods for setting the ground-water protection standards, disposal impoundments that exceed their ground-water protection standard as a result of such regulatory amendments would still be required to close. If necessary, conforming amendments will be made to today's rule to be consistent with any future changes to Subpart F.

The Agency is concerned that basing the evidence of a release from a unit on contamination of ground water alone may overlook releases that have occurred but have not yet been detected by the ground-water monitoring system. The Agency is also concerned about contamination to media besides ground water, e.g., soil contamination or leaching of hazardous constituents to surface water. While the unit remains subject to all corrective action requirements for all media, the initial determinations of whether expedited corrective action is required under today's proposal for delayed closure are based on ground-water monitoring data. The Agency is requesting comments on the approach of basing the evidence of a release on ground-water monitoring results only and whether other options may be appropriate.

The Agency is proposing more stringent corrective action requirements for disposal impoundments because of the greater risks associated at units where hazardous wastes have not been removed. The Agency is also imposing more stringent requirements on impoundments that are leaking on the date of the final receipt of hazardous waste to ensure that these units do not exacerbate any threats to human health and the environment. These requirements are discussed in detail below.

(1) *Disposal Impoundments.* As discussed above, § 264.113(e)(8) proposes that disposal impoundments must not have detected a release to ground water as a condition of delaying closure to receive only nonhazardous waste. Any disposal impoundment having a statistically significant increase over background values of monitoring parameters or constituents or exceeding the ground-water protection standard on the date of the final receipt of hazardous waste, based on the most recent ground-water monitoring data as required under Part 264, Subpart F, is not eligible for delayed closure. If a statistically significant increase in background values is detected, or if the ground-water protection standard is exceeded, corrective action must be conducted as required under Subpart F and the unit must be closed in accordance with the approved closure

plan and other requirements in Subparts G and K.

(2) *Surface Impoundments At Which Wastes Are Removed.* The Agency is proposing in § 264.113(e) (5), (6), and (7) the corrective action requirements imposed on owners or operators who intend to remove hazardous wastes from their impoundments as a condition of delaying closure. These sections vary depending on whether or not a release has been detected by the date of the final receipt of hazardous wastes. These regulations are discussed below.

(a) *Releases at the Time of the Final Receipt of Hazardous Wastes* (Exhibit 2 in Section III.B of this preamble). The Agency is proposing in § 264.113(e) (5) and (6) to require owners or operators of surface impoundments intending to remove hazardous wastes to cease the receipt of all wastes if they have detected contamination statistically greater than background levels of detection monitoring parameters or constituents, or in excess of their ground-water protection standard at the point of compliance. The most recent monitoring data required under Subpart F will be used to make this determination by the date of the final receipt of hazardous wastes. An exception would be granted to owners or operators who remove hazardous wastes from the impoundment by flushing with non-hazardous wastes. In this case, the impoundment may continue to receive non-hazardous waste only to complete the flushing process in accordance with the timeframes established in § 264.113(e)(4)(ii).

Non-hazardous wastes may not be received at a unit with a release statistically greater than background levels or exceeding the ground-water protection standard on the date of the final receipt of hazardous waste until corrective measures have been implemented. These measures must be consistent with an approved contingent corrective measures plan or with provisions of an approved corrective action plan otherwise required in Subpart F. The specific corrective measures that must be implemented to allow a facility to receive nonhazardous wastes will be specified on a case-by-case basis in the plan. However, if an owner or operator can demonstrate that the release is not statistically greater than background levels or does not exceed the facility's ground-water protection standard, he may continue to receive non-hazardous wastes.

The Agency intends that the corrective measures to be implemented be more than studies of the extent of contamination or development of remedial alternatives. Rather, the Agency would expect containment and/or remediation activity, consistent with the activities described in the contingent corrective measures plan, to be undertaken. For example, installing removal wells and a slurry wall and starting the pumping and treating of contaminated ground water might satisfy the requirement that corrective measures be implemented.

The Agency recognizes that stopping the receipt of all wastes until corrective measures have been implemented could adversely affect the operations of some types of facilities. The Agency believes that in most cases, however, the delay should not be extensive. First, many of the units that may have to stop the receipt of wastes because a release has been detected at the time of the final receipt of hazardous wastes will have already triggered compliance monitoring and/or be engaged in a corrective action program under Subpart F prior to today's proposal. In fact, remedies may already be under review for such units. Therefore, there should not be an extensive delay before the unit is placed on a compliance schedule for corrective action and the unit can receive non-hazardous wastes. Second, because these units have detected releases, the Agency expects that in most cases these facilities will have a high priority for approval of corrective action plans. At the same time, prohibiting the continued receipt of non-hazardous waste until corrective measures have begun should provide an incentive for owners or operators to implement corrective measures as soon as possible after the approval of a corrective action plan.

The Agency considered allowing units that are leaking on the date of the final receipt of hazardous wastes to receive non-hazardous wastes if the owner or operator makes a demonstration that the receipt of non-hazardous wastes will not exacerbate threats to human health and the environment or impede the effectiveness of the corrective measures, and that these corrective measures will be implemented within one year from the final receipt of hazardous waste. It has been argued that, particularly for owners or operators who will remove the hazardous wastes by flushing with non-hazardous influent, allowing the further receipt of non-hazardous wastes at these units after flushing has been completed may not increase the environmental risks. According to the argument, allowing the continued receipt of non-hazardous wastes will further dilute certain types of constituents in the impoundment and thus may decrease the potential for threats to human health and the environment.

The Agency is not proposing this approach for a number of reasons. First, because hazardous wastes remain in the unit, it would be necessary to evaluate the impacts of allowing the receipt of non-hazardous wastes on the effectiveness of the corrective action program. Because the units in question do not satisfy liner and leachate collection system requirements, the Agency must be assured that the requirements applicable to these units provide adequate protection of human health and the environment. (This is a particular concern for facilities awaiting permit approval where characterization of ground-water flows, hydrogeologic conditions, the extent of the plume, etc., may not yet have been subject to the rigorous review that occurs during permitting.) The Agency is not convinced that it will be possible to effectively evaluate such impacts. The Agency also is uncertain about what criteria should be used to evaluate the impacts of the continued receipt of non-hazardous wastes on the effectiveness of corrective action. Finally, the Agency is concerned that the effort required to evaluate these demonstrations will be time-consuming and not an effective use of Agency resources.

The Agency is requesting comments on whether impoundments not meeting liner and leachate collection system requirements that are leaking on the date of the final receipt of hazardous wastes should be allowed to receive non-hazardous wastes prior to the institution of a corrective action program. Particularly, the Agency is soliciting information on the impacts of hydraulic head on the effectiveness of corrective action, the types of data necessary to make these determinations, deadlines for making these demonstrations, and whether this option should be available to all impoundments or only impoundments that have already received permits.

(b) *Releases After the Final Receipt of Hazardous Wastes* (Exhibit 3 in Section III.B of this preamble). Today's rule proposes in § 264.113(e)(7) to allow an owner or operator of an impoundment that does not meet liner and leachate collection system requirements and whose hazardous wastes have been removed to continue operating the unit if a release is detected after the date of the final receipt of hazardous wastes under limited circumstances. After the detection of a release, the unit only be allowed to continue to receive non-hazardous waste *only* if corrective measures consistent with the approved

contingent corrective measures plan are implemented within one year of the detection of the release, or approval of the contingent corrective measures plan, whichever is later, and if the continued receipt of non-hazardous waste will not pose a threat to human health and the environment. Again, the conditions for demonstrating that corrective measures have been established will be specified on a case-by-case basis in the corrective action plan. (As discussed earlier, the Regional Administrator retains the authority to require additional corrective measures in the final corrective action plan.)

Again, while a demonstration that corrective measures have been put in place must be more than the completion of studies, the implementation of interim measures (e.g., installing slurry walls and initiating a pump and treat program) may be sufficient. If the Regional Administrator determines that the continued receipt of non-hazardous waste during this one-year period is posing a threat to human health or the environment, he has the authority to either require that corrective measures be implemented in less than one year or to require that the receipt of non-hazardous wastes cease until corrective measures are implemented.

While it is the Agency's policy that corrective action be undertaken promptly, it recognizes that at large units or facilities a longer time could be needed to completely assess the nature and extent of the contamination and specify remedies or that delays in cleanup activities could be caused by timing issues beyond the control of the owner or operator (e.g., availability of cleanup contractors, weather conditions). The Agency considered giving the Regional Administrator the authority to grant extensions to the one-year deadline for implementing corrective measures. However, the Agency wished to avoid additional administrative burdens and delays in getting corrective measures implemented and still believes that one year should provide adequate time. The Agency is requesting comments on this one-year deadline and suggestions on other alternatives.

d. *Evaluating Progress of Corrective Action.* In § 264.113(e)(10), the Agency is proposing that impoundments that have removed all hazardous wastes and have been allowed to delay closure to receive non-hazardous waste in accordance with the requirements in § 264.113 (d) and (e)(2) must initiate closure if the owner or operator fails to make substantial progress in implementing corrective action and achieving the facility's ground-water protection standard or background levels if the facility has not yet established a ground-water protection standard.

The Agency is not proposing to define "substantial progress" in today's rule. Rather, the Agency believes that this determination should be made on a case-by-case basis based on an evaluation of the progress of the corrective action program towards achieving the ground-water protection standard (or background levels if applicable). In addition, the Regional Administrator will evaluate the effect of the continued receipt of non-hazardous waste on the effectiveness of the corrective measures being taken in determining whether substantial progress towards the ground-water protection standards has been achieved. In general, the Agency would consider the failure to comply with significant deadlines in the schedule of compliance, the permit, or other enforcement orders that establish timeframes for achieving the facility's ground-water protection standard as cause for closure. The Agency does not intend failure to comply with procedural or reporting requirements that do not affect the progress of corrective action to be cause for closure; on the other hand, compliance with deadlines for procedural or reporting requirements alone will not be considered a demonstration of substantial progress.

A determination of whether the unit has demonstrated substantial progress in its corrective action program would be based, in part, on the results of the semi-annual reports required under § 264.113(e)(9). Proposed § 264.113(e)(9) requires the owner or operator to submit reports to the Regional Administrator that describe the progress of the corrective measures, including results of ground-water monitoring and the effect of the receipt of non-hazardous wastes on the effectiveness of the corrective action. The amount of time allowed for demonstrating that substantial progress toward achieving the ground-water protection standard has been achieved, will be a site-specific decision that is dependent upon the nature, extent, and magnitude of the contamination, as well as the nature of the remedial measures.

Today's rule also establishes an accelerated set of procedures for initiating closure if the owner or operator fails to demonstrate substantial progress in achieving the ground-water protection standard. The objective of these accelerated procedures is to reduce delays in initiating closure, while still providing adequate due process to the owner or operator and adequate notice to the public.

Under proposed § 264.113(a)(11), the Regional Administrator must notify the owner or operator in writing that he has failed to make substantial progress and that he will be required to close the unit in accordance with the deadline in § 264.113 (a) and (b). The Regional Administrator must provide the owner or operator a detailed statement of reasons for his determination and also publish a newspaper notice of this decision and provide a 20-day comment period. If the Regional Administrator does not receive written comments on the decision to require closure of the unit, the decision will be final five days after the close of the comment period. The Regional Administrator will then notify the owner or operator that he must submit a revised closure plan, if necessary, within 15 days of the final notice and commence closure in accordance with the deadlines in § 264.113 (a) and (b). If written comments are received, the Regional Administrator will make a final determination no later than 30 days after the end of the comment period and notify the owner or operator and the public of the decision by newspaper notice.

Because the Agency is concerned that closure be commenced as quickly as possible once it is determined that the unit is not demonstrating substantial progress towards achieving the ground-water protection standard to ensure protection of human health and the environment, today's proposal does not provide for administrative appeals of the Regional Administrator's decision to require closure. The proposed rule, however, does include a formal comment period (in addition to informal negotiations prior to the final Agency decision). In addition, the decision to require closure would constitute a final Agency decision and is therefore subject to judicial appeal. The Agency does not believe that disallowing administrative appeals will violate the due process rights of the owner or operator.

3. Notification of Closure

Section 264.112(d)(1) currently requires an owner or operator to notify the Regional Administrator at least 60 days prior to the expected date of closure, defined in § 264.112(d)(2) as no later than 30 days after the final receipt of *hazardous* waste. EPA proposes to add subsection (ii) to §264.112(d)(2) to specify that for units that have delayed closure after the final receipt of hazardous waste, the "expected date of closure" is no later than 30 days after

the final receipt of non-hazardous wastes. Therefore, an owner or operator who has delayed closure after the final receipt of hazardous waste to receive only non-hazardous waste must notify the Regional Administrator at least 60 days prior to the final receipt of non-hazardous waste.

C. Part 270 Permit Modification Requirements

For facilities with RCRA permits, the request to modify the permit to extend the closure period would be considered under the current regulations to be a major modification subject to public notice and comment and procedures in Part 124. The demonstrations discussed earlier must be submitted to the Agency for approval with a request to modify the permit at least 120 days prior to the final receipt of hazardous waste, or within 90 days after the final rule is published in the **Federal Register** as required in § 270.41, whichever is later.

If, subsequent to approval of the permit modifications, an owner or operator changes the types of non-hazardous wastes that are handled in the unit, he must again request a modification to the permit and demonstrate that the addition of these new non-hazardous wastes is also compatible with the hazardous and non-hazardous wastes in the unit and past, current and future operations.

On September 23, 1987, the Agency proposed amendments to the Part 270 procedures for modifying permits. Today's rule proposes a conforming change to the September 23, 1987, proposal to make the procedures for modifying a permit for delayed closure consistent with that scheme. The Agency is proposing to classify an extension to the closure period to receive non-hazardous waste following final receipt of hazardous waste as a Class 2 modification and to add it to Appendix I of § 270.42, "Classification of Permit Modifications." In order to request this Class 2 modification, the owner or operator must submit the demonstrations and changes to facility plans required in § 264.133 (d) and (e) and described in IV.B.1 in this preamble. If these proposed amendments to Part 270 do not become final, an extension of the closure period to receive non-hazardous waste will continue to be classified as a major permit modification.

While it has not proposed changes to Part B application requirements, the Agency wishes to make clear that Part B applications submitted in order to delay closure under today's rule will be required to contain, for the non-hazardous wastes to be received, all of the elements required in a Part B application for a facility continuing to receive hazardous waste. Such information would include closure and post-closure plans revised to account for non-hazardous wastes, revised documentation of financial assurance under §§ 264.143 and 264.145, and a revised ground-water monitoring program. The Agency considers it appropriate to have such information submitted in the Part B application because facilities delaying closure will continue to be considered hazardous waste facilities. This is consistent with the Agency's position that facilities delaying closure must continue to comply with the permitting requirements of Subtitle C.

D. Conforming Changes

The Agency is proposing conforming changes to the interim status standards in Part 265 that parallel the technical requirements in Part 264 for deferring closure to receive only non-hazardous wastes. The interim status requirements are substantially the same as those for permitted units. Today's rule also proposes conforming changes to §§ 264.13 (a) and (b) and 265.13 (a) and (b) and to §§ 264.142(a)(3) and 264.142(a)(4) and 265.142(a)(3) and 265.142(a)(4). These differences are highlighted below.

1. Conforming Changes to Part 265 Interim Status Requirements

a. *Initial Demonstrations.* Proposed § 265.113 (d)(1) requires owners or operators of interim status units, to submit amended Part B applications, or Part B applications if one was not previously required, with the revised facility plans and required demonstrations. Part B applications are required because the Agency does not believe that a facility should be allowed to remain open to receive non-hazardous waste while remaining in interim status. The Agency is particularly concerned that units that do not satisfy the double liner and leachate collection system requirements and remain open under today's proposal be subject to the stricter provisions of Part 264, especially the stricter ground-water protection requirements of Subpart F to sufficiently protect human health and the environment. Plans and demonstrations must be submitted at least 180 days prior to the final receipt of hazardous wastes. This 180-day deadline is consistent with the deadline in § 265.112(d) for notifying the Regional Administrator of closure and submitting the closure plan for review and approval. Owners or operators who already have received their final volume of hazardous wastes or will receive it in the near future will be eligible to delay closure if they submit their Part B application and the required demonstrations no later than 90 days after notice of today's final rule is published in the **Federal Register**.

As discussed above, under today's proposal, facility owners and operators would be required to operate under the full permit requirements of 40 CFR Part 264. However, because the Agency cannot guarantee that a Part B permit will be issued prior to the final receipt of hazardous wastes, the Agency is proposing to allow the owner or operator to remain open after the final receipt of hazardous wastes to receive only non-hazardous wastes prior to issuance of the permit. During this period the owner or operator must comply with all of the applicable requirements in § 265.113 (d) and (e) and continue to conduct operations in accordance with all other applicable Part 265 requirements. If the Agency subsequently denies the permit, the Part 265 closure requirements, including the closure deadlines of § 265.113 (a) and (b), become effective immediately.

We recognize that there may be concern about allowing interim status facilities to delay closure while a decision on a permit application and delay of closure is pending. However, the Agency is convinced that the applicability criteria in §265.113(d) together with the technical requirements in §265.113(e) for delaying closure and other Part 265 requirements are sufficient to preclude any increases in threats to human health and the environment during the permit review period. In the case of surface impoundments that choose to or must remove wastes to delay closure, the required activities are consistent with current Subpart G closure requirements. Therefore, even if the request to delay closure and/or an operating permit is denied, the owner or operator will have begun the closure process by removing the hazardous wastes from the impoundment. In addition, a facility awaiting a determination of a request to delay closure remains subject to all Part 265 requirements and applicable enforcement authorities, including RCRA section 3008(h) corrective action orders.

b. *Corrective Action.* The Agency is proposing slightly different triggers for corrective action requirements for interim status units than for permitted units. For interim status facilities that have not yet established a ground-water protection standard, the Agency is proposing that the corrective action

requirements in § 265.113(e) be triggered by a statistically significant increase in hazardous constituents over background levels or decrease in pH over background levels. The Agency has chosen background as the baseline to measure the presence of a release to ensure that interim status impoundments that do not satisfy liner and leachate collection system requirements and wish to delay closure to receive only non-hazarous wastes remain protective of human health and the environment. This approach is consistent with the current triggers in Part 265, Subpart F for implementing the ground-water quality assessment plan.

Interim status impoundments that do not meet the liner and leachate collection system requirements and do not remove hazardous wastes will be allowed to remain open to receive only non-hazardous waste *if* no statistically significant increase in contamination above background levels (or decrease in pH levels) as specified in accordance with Subpart F has been detected. If background levels are exceeded at any time after the request to defer closure has been granted, the owner or operator of a disposal impoundment that does not satisfy the liner and leachate collection system requirements must initiate closure of the unit in accordance with the approved closure plan. Similarly, impoundments not in compliance with liner and leachate collection system requirements that remove hazardous wastes prior to receiving only non-hazardous wastes are subject to accelerated corrective action requirements consistent with the Part 264 requirements described above. Again, as discussed earlier, these corrective measures requirements are in addition to requirements in Subpart F or those included in a RCRA section 3008(h) corrective action order.

c. *Applicability to New Interim Status Units.* The requirements in today's proposal also apply to owners or operators of units that receive interim status as a result of new regulations (e.g., additional listings of hazardous wastes). For example, HSWA section 3005(j) requires that surface impoundments that receive interim status after November 8, 1984, because of new regulations, such as the promulgation of additional listings or characteristics for the identification of hazardous wastes, must satisfy the MTRs within four years of the promulgation that subjected the unit to RCRA Subtitle C. These owners or operators will be given sufficient notice that they will become subject to Subtitle C requirements; therefore requiring that the Part B application be submitted no later than 180 days prior to the final receipt of hazardous wastes as a condition of delaying closure to receive only non-hazardous waste should not impose an undue burden.

2. Other Conforming Changes to Parts 264 and 265

The Agency is proposing a conforming change to §§ 264.13 (a) and (b) and 265.13 (a) and (b) to require that the waste analysis plan be revised to account for the presence of any non-hazardous wastes managed pursuant to §§ 264.113 (d) and (e) and 265.113 (d) and (e). Today's rule also revises §§ 264.142(a) (3) and (4) and 265.142(a) (3) and (4) to specify that an owner or operator may not account for salvage value or incorporate a zero cost in the closure cost estimate for handling non-hazardous waste at closure, consistent with the current limitations in §§ 264.142 and 265.142 for hazardous wastes.

V. State Authorization

A. Applicability of Rules in Authorized States

Under section 3006 of RCRA, EPA may authorize qualified States to administer and enforce the RCRA program within the State. (See 40 CFR Part 271 for the standards and requirements for authorization.) Following authorization, EPA retains enforcement authority under RCRA sections 3008, 7003, and 3013, although authorized States have primary enforcement responsibility.

Prior to HSWA, a State with final authorization administered its hazardous waste program entirely in lieu of EPA administering the Federal program in that State. The Federal requirements no longer applied in the authorized State, and EPA could not issue permits for any facilities in a State where the State was authorized to permit. When new, more stringent Federal requirements were promulgated or enacted, the State was obligated to enact equivalent authority within specified time frames. New Federal requirements did not take effect in an authorized State until the State adopted the requirements as State law.

In contrast, under section 3006(g) of RCRA, 42 U.S.C. 6926(g), new requirements and prohibitions imposed by the HSWA take effect in authorized States at the same time that they take effect in non-authorized States. EPA is directed to carry out those requirements and prohibitions in authorized States, including the issuance of permits, until the State is granted authorization to do so. While States must still adopt HSWA-related provisions as State law to retain final authorization, the HSWA requirements and prohibitions apply in authorized States in the interim.

B. Effect of Proposed Rule on State Authorizations

Today's rule proposes standards that would not be effective in authorized States since the requirements would not be imposed pursuant to HSWA. Thus, the requirements will be applicable only in those States that do not have interim or final authorization. In authorized States, the requirements will not be applicable until the State revises its program to adopt equivalent requirements under State law.

In general, 40 CFR 271.21(e)(2) requires States that have final authorization to modify their programs to reflect Federal program changes and to subsequently submit the modifications to EPA for approval. It should be noted, however, that authorized States are only required to modify their programs when EPA promulgates Federal standards that are more stringent or broader in scope than the existing Federal standards. Section 3009 of RCRA allows States to impose standards more stringent than those in the Federal program. For those Federal program changes that are less stringent or reduce the scope of the Federal program, States are not required to modify their programs. See 40 CFR 271.1(i). The standards proposed today are less stringent than or reduce the scope of the existing Federal requirements. Therefore, authorized States would not be required to modify their programs to adopt requirements equivalent or substantially equivalent to the provisions listed above. If the State does modify its program, EPA must approve the modification for the State requirements to become Subtitle C RCRA requirements. States should follow the deadlines of 40 CFR 271.21(e)(2) if they desire to adopt this less stringent requirement.

VI. Executive Order 12291

This regulation was submitted to the Office of Management and Budget for review as required by Executive Order 12291. The regulatory amendments being proposed today are designed to reduce the burden of the RCRA regulations and are not likely to result in a significant increase in costs. Thus, this proposal is not a major rule; no Regulatory Impact Analysis has been prepared.

VII. Paperwork Reduction Act

The information collection requirements contained in this rule have

been submitted to the Office of Management and Budget (OMB) under the provisions of the Paperwork Reduction Act of 1980 (44 U.S.C. 3501 *et seq.*). Comments on these requirements should be submitted to the Office of Information and Regulatory Affairs, OMB, 726 Jackson Place, NW., Washington, DC 20608, marked: Attention—Desk Officer for EPA. Should EPA promulgate a final rule, the Agency will respond to comments by OMB or the public regarding the information collection provisions of this rule.

VIII. Regulatory Flexibility Act

Under the Regulatory Flexibility Act of 1980 (5 U.S.C. 801 *et seq.*), Federal agencies must, in developing regulations, analyze their impact on small entities (small businesses, small government jurisdictions, and small organizations). The amendments proposed today are more flexible than the existing regulations and thus result in no additional costs. The viability of small entities, thereby, should not be adversely affected.

Accordingly, I certify that this regulation will not have a significant impact on a substantial number of small entities.

List of Subjects

40 CFR Part 264

Hazardous waste, Insurance, Packaging and containers, Reporting and recordkeeping requirements, Security measures, Surety bonds.

40 CFR Part 265

Hazardous waste, Insurance, Packaging and containers, Reporting and recordkeeping requirements, Security measures, Surety bonds, Water supply.

40 CFR Part 270

Administrative practice and procedure, Confidential business information, Hazardous materials transportation, Hazardous waste, Reporting and recordkeeping requirements, Water pollution control, Water supply.

Dated: May 27, 1988.

Lee M. Thomas,

Administrator.

For the reasons set out in the preamble, it is proposed that 40 CFR Chapter I be amended as follows:

PART 264—STANDARDS FOR OWNERS AND OPERATORS OF HAZARDOUS WASTE TREATMENT, STORAGE, AND DISPOSAL FACILITIES

1. The authority citation for Part 264 continues to read as follows:

Authority: Sections 1006, 2002(a), 3004, and 3005 of the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act of 1976, as amended (42 U.S.C. 6905, 6912(a), 6924, and 6925.

2. In § 264.13 paragraphs (a)(1), (a)(3) introductory text, (a)(3)(i), and (b)(1) are revised to read as follows:

§ 264.13 General waste analysis.

(a)(1) Before an owner or operator treats, stores, or disposes of any hazardous wastes, or non-hazardous wastes if applicable under § 264.113(d), he must obtain a detailed chemical and physical analysis of a representative sample of the wastes.

* * * * *

(3) The analysis must be repeated as necessary to ensure that it is accurate and up-to-date. At a minimum, the analysis must be repeated:

(i) When the owner or operator is notified, or has reason to believe, that the process or operation generating the hazardous wastes or non-hazardous wastes if applicable under § 264.113(d) has changed; and

* * * * *

(b) * * *

(1) The parameters for which each hazardous waste or non-hazardous waste if applicable under § 264.113(d) will be analyzed and the rationale for the selection of these parameters (i.e., how analysis for these parameters will provide sufficient information on the waste's properties to comply with paragraph (a) of this section);

* * * * *

3. In § 264.112, paragraph (d)(2) is revised to read as follows:

§ 264.112 Closure plan; amendment of plan.

* * * * *

(d) * * *

(2) The date when he "expects to begin closure" must be either:

(i) No later than 30 days after the date on which any hazardous waste management unit receives the known final volume of hazardous wastes, or if there is a reasonable possibility that the hazardous waste management unit will receive additional hazardous wastes, no later than one year after the date on which the unit received the most recent volume of hazardous wastes. If the owner or operator of a hazardous waste management unit can demonstrate to the Regional Administrator that the hazardous waste management unit or facility has the capacity to receive additional hazardous wastes and he has taken all steps to prevent threats to human health and the environment, including compliance with all applicable permit requirements, the Regional Administrator may approve an extension to this one-year limit; or

(ii) For units meeting the requirements of § 264.113(d), no later than 30 days after the date on which the hazardous waste management unit receives the known final volume of non-hazardous wastes, or if there is a reasonable possibility that the hazardous waste management unit will receive additional non-hazardous wastes, no later than one year after the date on which the unit received the most recent volume of non-hazardous wastes. If the owner or operator can demonstrate to the Regional Administrator that the hazardous waste management unit has the capacity to receive additional non-hazardous wastes and he has taken, and will continue to take, all steps to prevent threats to human health and the environment, including compliance with all applicable permit requirements, the Regional Administrator may approve an extension to this one-year limit.

* * * * *

4. Section 264.113 is amended by revising paragraphs (a) introductory text, (a)(1)(ii)(A), (b) introductory text, (b)(1)(ii)(A), and (c) and adding (d) and (e) to read as follows:

§ 264.113 Closure; time allowed for closure.

(a) Within 90 days after receiving the final volume of hazardous wastes, or the final volume of non-hazardous wastes if the owner or operator complies with all applicable requirements in paragraphs (d) and (e) of this section, at a hazardous waste management unit or facility, the owner or operator must treat, remove from the unit or facility, or dispose of on-site, all hazardous wastes in accordance with the approved closure plan. The Regional Administrator may approve a longer period if the owner or operator complies with all applicable requirements for requesting a modification to the permit and demonstrates that:

(1) * * *

(ii)(A) The hazardous waste management unit or facility has the capacity to receive additional hazardous wastes or non-hazardous wastes if the owner or operator complies with

paragraphs (d) and (e) of this section; and

* * * * *

(b) The owner or operator must complete partial and final closure activities in accordance with the approved closure plan and within 180 days after receiving the final volume of hazardous wastes, or the final volume of non-hazardous wastes if the owner or operator complies with all applicable requirements in paragraphs (d) and (e) of this section, at the hazardous waste management unit or facility. The Regional Administrator may approve an extension to the closure period if the owner or operator complies with all applicable requirements for requesting a modification to the permit and demonstrates that:

(1) * * *

(ii)(A) The hazardous waste management unit or facility has the capacity to receive additional hazardous wastes or non-hazardous wastes if the owner or operator complies with paragraphs (d) and (e) of this section; and

* * * * *

(c) The demonstrations referred to in paragraphs (a)(1) and (b)(1) of this section must be made as follows: (1) The demonstrations in paragraph (a)(1) of this section must be made at least 30 days prior to the expiration of the 90-day period in paragraph (a) of this section; and (2) the demonstration in paragraph (b)(1) of this section must be made at least 30 days prior to the expiration of the 180-day period in paragraph (b) of this section, unless the owner or operator is otherwise subject to the deadlines in paragraph (d) of this section.

(d) The Regional Administrator may allow an owner or operator to receive only non-hazardous wastes in a landfill or surface impoundment unit after the final receipt of hazardous wastes at that unit if:

(1) The owner or operator requests a permit modification in compliance with all applicable requirements in Parts 270 and 124 of this title and in the permit modification request demonstrates that:

(i) The unit has the existing design capacity as indicated on the Part A application to receive non-hazardous wastes; and

(ii) There is a reasonable likelihood that the owner or operator or another person will receive non-hazardous wastes in the unit within one year after the final receipt of hazardous wastes; and

(iii) The non-hazardous wastes will not be incompatible with any remaining wastes in the unit, or with the facility design and operating requirements of the unit or facility under this Part; and

(iv) Closure of the hazardous waste management unit would be incompatible with continued operation of the unit or facility; and

(v) The owner or operator is operating and will continue to operate in compliance with all applicable permit requirements; and

(2) The request to modify the permit includes an amended waste analysis plan, ground-water monitoring and response program, and closure and post-closure plans, and updated cost estimates and demonstrations of financial assurance for closure and post-closure care as necessary to reflect any changes due to the presence of hazardous constituents in the non-hazardous wastes, and changes in closure activities, including the expected year of closure if applicable under § 264.112(b)(7), as a result of the receipt of non-hazardous wastes following the final receipt of hazardous wastes; and

(3) The request to modify the permit and the demonstrations referred to in paragraph (d)(1) and (d)(2) of this section are submitted to the Regional Administrator no later than 120 days prior to the date on which the owner or operator of the facility receives the known final volume of hazardous wastes at the unit, or no later than 90 days after **Federal Register** notice of this regulation, whichever is later; and

(4) The request to modify the permit is accompanied by the human exposure assessment required under RCRA section 3019, and the Regional Administrator does not determine, based on this information or information from other sources, that the unit poses a substantial risk to human health and the environment; and

(5) The request to modify the permit includes revisions, as appropriate, to affected conditions of the permit to account for the management of only non-hazardous wastes in a unit which previously managed hazardous wastes.

(e) In addition to the requirements in paragraph (d) of this section, an owner or operator of a hazardous waste surface impoundment that is not in compliance with the liner and leachate collection system requirements in 42 U.S.C. 3004(o)(1) and 3005(j)(1) or 42 U.S.C. 3004(o) (2) or (3) or 3005(j) (2), (3), (4) or (13) must:

(1) Submit with the request to modify the permit:

(i) A contingent corrective measures plan, unless a corrective action plan has already been submitted under § 264.99; and

(ii) A plan for demonstrating compliance with one of the options described in paragraphs (e)(2) and (e)(3) of this section; and

(2) Remove all hazardous wastes from the unit by either:

(i) Removing all hazardous liquids, and removing all hazardous sludges to the extent practicable without impairing the integrity of the liner(s); or

(ii) Where removal in accordance with paragraph (e)(2)(i) of this section is infeasible or impracticable, displacing at least 95 percent of the liquid and suspended solid hazardous wastes (as measured volumetrically) by flushing with non-hazardous wastes, removing all hazardous sludges to the extent practicable without impairing the integrity of the liner(s), if applicable, and demonstrating that the liquids and suspended solids remaining in the unit do not exhibit a characteristic of hazardous waste identified in Subpart C of Part 261; or

(3) Leave the hazardous wastes in place following the final receipt of hazardous wastes and comply with the requirements in paragraph (e)(8) of this section if a release is detected that is a statistically significant increase over background values for detection monitoring parameters or constituents specified in the permit, or exceeds the facility's ground-water protection standard at the point of compliance, if applicable, as specified under Subpart F of this part.

(4) The activities referred to in paragraph (e)(2) of this section must be completed as follows:

(i) For units meeting the requirements of paragraph (e)(2)(i) of this section, no later than 90 days after the final receipt of hazardous wastes; or

(ii) For units meeting the requirement of paragraph (e)(2)(ii) of this section, the process of displacing and removing the hazardous wastes must begin no later than 15 days after the final receipt of hazardous wastes and be completed no later than 90 days after the final receipt of hazardous wastes.

(iii) The Regional Administrator may approve an extension to the deadlines in paragraph (e)(4)(i) or (ii) of this section if the owner or operator demonstrates that the removal or displacement of hazardous wastes will, of necessity, take longer than the allotted periods to complete and that an extension will not pose a threat to human health and the environment.

(5) If a release that is a statistically significant increase over background values for detection monitoring parameters or constitutents specified in the permit or that exceeds the facility's ground-water protection standard at the point of compliance, if applicable, has

been detected in accordance with the requirements in Subpart F of this part prior to the final receipt of hazardous wastes at a surface impoundment subject to the requirements in paragraph (e)(2)(i) of this section, the owner or operator must cease the receipt of all wastes at the unit until corrective action measures in accordance with an approved contingent corrective measures plan required by paragraph (e)(1) of this section have been implemented.

(6) If a release that is a statistically significant increase over background values for detection monitoring parameters or constituents specified in the permit or that exceeds the facility's ground-water protection standard at the point of compliance, if applicable, has been detected in accordance with the requirements in Subpart F of this part prior to the final receipt of hazardous wastes at a surface impoundment subject to the requirements in paragraph (e)(2)(ii) of this section, the owner or operator must cease the receipt of all wastes following the displacement of hazardous wastes as specified in paragraphs (e)(2)(ii) and (e)(4)(ii) of this section until corrective action measures in accordance with the approved contingent corrective measures plan required in paragraph (e)(1) of this section have been implemented.

(7) If a release that is a statistically significant increase over background values for detection monitoring parameters or constituents specified in the permit or that exceeds the facility's ground-water protection standard at the point of compliance, if applicable, is detected in accordance with the requirements in Subpart F of this part after the final receipt of hazardous wastes at a surface impoundment subject to the requirements in paragraph (e)(2) of this section, the owner or operator of the unit must implement corrective action measures in accordance with the approved contingent corrective measures plan required by paragraph (e)(1) of this section no later than one year after detection of the release, or approval of the contingent corrective measures plan, whichever is later. The Regional Administrator may require the owner or operator to implement corrective measures in less than one year or to cease the receipt of wastes until corrective measures have been implemented if necessary to protect human health and the environment.

(8) If a release that is a statistically significant increase over background values for detection monitoring parameters or constituents specified in the permit or that exceeds the facility's ground-water protection standard at the point of compliance, if applicable, is detected in accordance with the requirements of Subpart F of this part at a surface impoundment subject to the requirements in paragraph (e)(3) of this section, the owner or operator must conduct corrective action in accordance with the requirements in Subpart F of this part and begin closure of the unit no later than 30 days after the detection of the release in accordance with the approved closure plan and the deadlines in paragraphs (a) and (b) of this section.

(9) During the period of corrective action, the owner or operator shall provide semi-annual reports to the Regional Administrator that describe the progress of the corrective action program, compile all ground-water monitoring data, and evaluate the effect of the continued receipt of non-hazardous wastes on the effectiveness of the corrective action.

(10) The Regional Administrator may require the owner or operator of a surface impoundment subject to the requirements in paragraph (e)(2) of this section to commence closure of the unit if the owner or operator fails to make substantial progress in implementing corrective action and achieving the facility's ground-water protection standard or background levels if the facility has not yet established a ground-water protection standard.

(11) If the Regional Administrator determines that substantial progress has not been made pursuant to paragraph (e)(10) of this section he shall:

(i) Notify the owner or operator in writing that substantial progress has not been made and he must begin closure in accordance with the deadlines in paragraphs (a) and (b) of this section and provide a detailed statement of reasons for this determination, and

(ii) Provide the owner or operator and the public, through a newspaper notice, the opportunity to submit written comments on the decision no later than 20 days after the date of the notice.

(iii) If the Regional Administrator receives no written comments, the decision will become final five days after the close of the comment period. The Regional Administrator will notify the owner or operator that the decision is final, and that a revised closure plan, if necessary, must be submitted within 15 days of the final notice and that closure must begin in accordance with the deadlines in paragraphs (a) and (b) of this section.

(iv) If the Regional Administrator receives written comments on the decision, he shall make a final decision within 30 days after the end of the comment period, and provide the owner or operator in writing and the public through a newspaper notice, a detailed statement of reasons for the final decision. If the Regional Administrator determines that substantial progress has not been made, closure must be initiated in accordance with the deadlines in paragraphs (a) and (b) of this section.

(v) The final determinations made by the Regional Administrator under paragraphs (d)(11) (iii) and (iv) of this section are not subject to administrative appeal.

5. In § 264.142, paragraphs (a)(3) and (a)(4) are revised to read as follows:

§ 264.142 Cost estimate for closure.

(a) * * *

(3) The closure cost estimate may not incorporate any salvage value that may be realized with the sale of hazardous wastes, or non-hazardous wastes if applicable under § 264.113(d), facility structures or equipment, land, or other assets associated with the facility at the time of partial or final closure.

(4) The owner or operator may not incorporate a zero cost for hazardous wastes, or non-hazardous wastes if applicable under § 264.113(d), that might have economic value.

* * * * *

PART 265—INTERIM STATUS STANDARDS FOR OWNERS AND OPERATORS OF HAZARDOUS WASTE TREATMENT, STORAGE, AND DISPOSAL FACILITIES

6. The authority citation for Part 265 continues to read as follows:

Authority: Section 1006, 2002(a), 3004, 3005, and 3015 of the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act of 1976, as amended (42 U.S.C. 6905, 6912(a), 6924, 6925, and 6935).

7. In § 265.13, paragraphs (a)(1), (a)(3) introductory text, (a)(3)(i), and (b)(1) are revised to read as follows:

§ 265.13 General waste analysis.

(a)(1) Before an owner or operator treats, stores or disposes of any hazardous wastes, or non-hazardous wastes if applicable under § 265.113(d), he must obtain a detailed chemical and physical analysis of a representative sample of the wastes.

* * * * *

(3) The analysis must be repeated as necessary to ensure that it is accurate and up-to-date. At a minimum, the analysis must be repeated:

(i) When the owner or operator is notified, or has reason to believe, that the process or operation generating the

hazardous wastes or non-hazardous wastes if applicable under § 265.113(d) has changed; and

* * * * *

(b) * * *

(1) The parameters for which each hazardous waste or non-hazardous waste if applicable under § 265.113(d) will be analyzed and the rationale for the selection of these parameters (i.e., how analysis for these parameters will provide sufficient information on the waste's properties to comply with paragraph (a) of this section);

* * * * *

8. In § 265.112, paragraph (d)(2) is revised to read as follows:

§ 265.112 Closure plan; amendment of plan.

* * * * *

(d) * * *

(2) The date when he "expects to begin closure" must be either:

(i) Within 30 days after the date on which any hazardous waste management unit receives the known final volume of hazardous wastes or, if there is a reasonable possibility that the hazardous waste management unit will receive additional hazardous wastes, no later than one year after the date on which the unit received the most recent volume of hazardous wastes. If the owner or operator of a hazardous waste management unit can demonstrate to the Regional Administrator that the hazardous waste management unit or facility has the capacity to receive additional hazardous wastes and he has taken, and will continue to take, all steps to prevent threats to human health and the environment, including compliance with all applicable interim status requirements, the Regional Administrator may approve an extension to this one-year limit; or

(ii) For units meeting the requirements of § 265.113(d), no later than 30 days after the date on which the hazardous waste management unit receives the known final volume of non-hazardous wastes, or if there is a reasonable possibility that the hazardous waste management unit will receive additional non-hazardous wastes, no later than one year after the date on which the unit received the most recent volume of non-hazardous wastes. If the onwer or operator can demonstrate to the Regional Administrator that the hazardous waste management unit has the capacity to receive additional non-hazardous wastes and he has taken, and will continue to take, all steps to prevent threats to human health and the environment, including compliance with all applicable interim status requirements, the Regional Administrator may approve an extension to this one-year limit.

* * * * *

9. Section 265.113 is amended by revising paragraphs (a) introductory text, (a)(1)(ii)(A), (b) introductory text, (b)(1)(ii)(A), and (c) and adding (d) and (e) to read as follows:

§ 265.113 Closure; time allowed for closure.

(a) Within 90 days after receiving the final volume of hazardous wastes, or the final volume of non-hazardous wastes if the owner or operator complies with all applicable requirements in paragraphs (d) and (e) of this section, at a hazardous waste management unit or facility, or within 90 days after approval of the closure plan, whichever is later, the owner or operator must treat, remove from the unit or facility, or dispose of on-site, all hazardous wastes in accordance with the approved closure plan. The Regional Administrator may approve a longer period if the owner or operator demonstrates that:

(1) * * *

(ii)(A) The hazardous waste management unit or facility has the capacity to receive additional hazardous wastes or non-hazardous wastes if the facility owner or operator complies with paragraphs (d) and (e) of this section; and

* * * * *

(b) The owner or operator must complete partial and final closure activities in accordance with the approved closure plan and within 180 days after receiving the final volume of hazardous wastes, or the final volume of non-hazardous wastes if the owner or operator complied with all applicable requirements in paragraphs (d) and (e) of this section, at the hazardous waste management unit or facility, or 180 days after approval of the closure plan, if that is later. The Regional Administrator may approve an extension to the closure period if the owner or operator demonstrates that:

(1) * * *

(ii)(A) The hazardous waste management unit or facility has the capacity to receive additional hazardous wastes or non-hazardous wastes if the facility owner or operator complies with paragraphs (d) and (e) of this section; and

* * * * *

(c) The demonstrations referred to in paragraphs (a)(1) and (b)(1) of this section must be made as follows: (1) The demonstrations in paragraph (a)(1) of this section must be made at least 30 days prior to the expiration of the 90-day period in paragraph (a) of this section; and (2) the demonstration in paragraph (b)(1) of this section must be made at least 30 days prior to the expiration of the 180-day period in paragraph (b) of this section, unless the owner or operator is otherwise subject to the deadlines in paragraph (d) of this section.

(d) The Regional Administrator may allow an owner or operator to receive only non-hazardous wastes in a landfill or surface impoundment unit after the final receipt of hazardous wastes at that unit if:

(1) The owner or operator submits an amended Part B application, or a Part B application, if not previously required, and demonstrates that:

(i) The unit has the existing design capacity as indicated on the Part A application to receive non-hazardous wastes; and

(ii) There is a reasonable likelihood that the owner or operator or another person will receive non-hazardous wastes in the unit within one year after the final receipt of hazardous wastes; and

(iii) The non-hazardous waste will not be incompatible with any remaining wastes in the unit or with the facility design and operating requirements of the unit or facility under this Part; and

(iv) Closure of the hazardous waste management unit would be incompatible with continued operation of the unit or facility; and

(v) The owner or operator is operating and will continue to operate in compliance with all applicable interim status requirements; and

(2) The Part B application includes an amended waste analysis plan, groundwater monitoring and response program, and closure and post-closure plans, and updated cost estimates and demonstrations of financial assurance for closure and post-closure care as necessary to reflect any changes due to the presence of hazardous constituents in the non-hazardous wastes, and changes in closure activities, including the expected year of closure if applicable under § 265.112(b)(7), as a result of the receipt of non-hazardous wastes following the final receipt of hazardous wastes; and

(3) The Part B application and the demonstrations referred to in paragraph (d)(1) and (d)(2) of this section are submitted to the Regional Administrator no later than 180 days prior to the date on which the facility owner or operator receives the known final volume of hazardous wastes, or no later than 90 days after **Federal Register** notice of this regulation, whichever is later; and

(4) The Part B application is accompanied by the human exposure assessment required under RCRA section 3019, and the Regional Administrator does not determine, based on this information or information from other sources, that the unit poses a substantial risk to human health and the environment; and

(5) The Part B application is amended, as appropriate, to account for the management of only non-hazardous wastes in a unit which previously managed hazardous wastes.

(e) In addition to the requirements in paragraph (d) of this section, an owner or operator of a hazardous waste surface impoundment that is not in compliance with the liner and leachate collection systems requirements in 42 U.S.C. 3004(o)(1) and 3005(j)(1) or 42 U.S.C. 3004 (o) (2) or (3) or 3005(j) (2), (3), (4) or (13) must:

(1) Submit with the Part B application:

(i) A contingent corrective measures plan; and

(ii) A plan for demonstrating compliance with one of the options described in paragraphs (e)(2) and (e)(3) of this section; and

(2) Remove all hazardous wastes from the unit by either:

(i) Removing all hazardous liquids and removing all hazardous sludges to the extent practicable without impairing the integrity of the liner(s), if applicable; or

(ii) Where removal in accordance with paragraph (e)(2)(i) of this section is infeasible or impracticable, displacing at least 95 percent of the liquid and suspended solid hazardous wastes (as measured volumetrically) by flushing with non-hazardous wastes, removing all hazardous sludges to the extent practicable without impairing the integrity of the liner(s), if applicable, and demonstrating that the liquids and suspended solids remaining in the unit do not exhibit a characteristic of hazardous waste identified in Subpart C of Part 261; or

(3) Leave the hazardous wastes in place following the final receipt of hazardous wastes and comply with the requirements in paragraph (e)(8) of this section if a release from the unit is detected that is a statistically significant increase (or decrease in the case of pH) over background levels.

(4) The activities referred to in paragraph (e)(2) of this section must be completed as follows:

(i) For units meeting the requirements of paragraph (e)(2)(i) of this section, no later than 90 days after the final receipt of hazardous wastes; or

(ii) For units meeting the requirement of paragraph (e)(2)(ii) of this section, the process of displacing and removing the hazardous wastes must begin no later than 15 days after the final receipt of hazardous wastes and be completed no later than 90 days after the final receipt of hazardous wastes.

(iii) The Regional Administrator may approve an extension to the deadlines in paragraph (e)(4) (i) or (ii) of this section if the owner or operator demonstrates that the removal or displacement of hazardous wastes will, of necessity, take longer than the allotted periods to complete and that extension will not pose a threat to human health and the environment.

(5) If a release that is a statistically significant increase (or decrease in the case of pH) in hazardous constituents over background levels has been detected in accordance with the requirements in Subpart F of this Part prior to the final receipt of hazardous wastes at a surface impoundment subject to the requirements in paragraph (e)(2)(i) of this section, the owner or operator must cease the receipt of all wastes at the unit until corrective measures in accordance with an approved contingent corrective measures plan required by paragraph (e)(1) of this section have been implemented.

(6) If a release that is a statistically significant increase (or decrease in the case of pH) in hazardous constituents over background levels has been detected in accordance with the requirements in Subpart F of this part prior to the final receipt of hazardous wastes at a surface impoundment subject to the requirements in paragraph (e)(2)(ii) of this section, the owner or operator must cease the receipt of all wastes following the displacement of hazardous wastes as specified in paragraph (e)(2)(ii) of this section until corrective action measures in accordance with the approved contingent corrective measures plan required by paragraph (e)(1) of this section have been implemented.

(7) If a release that is a statistically significant increase (or decrease in the case of pH) in hazardous constituents over background levels is detected in accordance with the requirements in Subpart F on this part after the final receipt of hazardous wastes at a surface impoundment subject to the requirements in paragraph (e)(2) of this section, the owner or operator of the unit must implement corrective measures in accordance with the approved contingent corrective measures plan required by paragraph (e)(1) of this section no later than one year after detection of the release, or approval of the contingent corrective measures plan, whichever is later. The Regional Administrator may require the owner or operator to implement corrective measures in less than one year or to cease receipt of wastes until corrective measures have been implemented if necessary to protect human health and the environment.

(8) If a release that is a statistically significant increase (or decrease in the case of pH) in hazardous constituents over background levels is detected in accordance with the requirements in Subpart F of this part at a surface impoundment subject to the requirements in paragraph (e)(3) of this section, the owner or operator must conduct corrective action in accordance with the requirements in Subpart F of this part and begin closure of the unit no later than 30 days after the detection of the release in accordance with the approved closure plan and the deadlines in paragraphs (a) and (b) of this section.

(9) During the period of corrective action, the owner or operator shall provide semi-annual reports to the Regional Administrator that describe the progress of the corrective action program, compile all ground-water monitoring data, and evaluate the effect of the continued receipt of non-hazardous wastes on the effectiveness of the corrective action.

(10) The Regional Administrator may require the owner or operator of a surface impoundment subject to the requirements in paragraph (e)(2) of this section to commence closure of the unit if the owner or operator fails to make substantial progress in implementing corrective action and achieving the facility's background levels.

(11) If the Regional Administrator determines that substantial progress has not been made pursuant to paragraph (e)(10) of this section he shall

(i) Notify the owner or operator in writing that substantial progress has not been made and he must begin closure in accordance with the deadline in paragraphs (a) and (b) of this section and provide a detailed statement of reasons for this determination, and

(ii) Provide the owner or operator and the public, through a newspaper notice, the opportunity to submit written comments on the decision no later than 20 days after the date of the notice.

(iii) If the Regional Administrator receives no written comments, the decision will become final five days after the close of the comment period. The Regional Administrator will notify the owner or operator that the decision is final, and that a revised closure plan, if necessary, must be submitted within 15 days of the final notice and that closure must begin in accordance with

the deadlines in paragraphs (a) and (b) of this section.

(iv) If the Regional Administrator receives written comments on the decision, he shall make a final decision within 30 days after the end of the comment period, and provide the owner or operator in writing and the public through a newspaper notice, a detailed statement of reasons for the final decision. If the Regional Administrator determines that substantial progress has not been made, closure must be initiated in accordance with the deadlines in paragraphs (a) and (b) of this section.

(v) The final determinations made by the Regional Administrator under paragraphs (d)(11) (iii) and (iv) of this section are not subject to administrative appeal.

10. In § 265.142, paragraphs (a)(3) and (a)(4) are revised to read as follows:

§ 265.142 Cost estimate for closure.

(a) * * *

(3) The closure cost estimate may not incorporate any salvage value that may be realized with the sale of hazardous wastes, or non-hazardous wastes if applicable under § 265.113(d), facility structures or equipment, land, or other assets associated with the facility at the time of partial or final closure.

(4) The owner or operator may not incorporate a zero cost for hazardous wastes, or non-hazardous wastes if applicable under § 265.113(d), that might have economic value.

* * * * *

PART 270—EPA ADMINISTERED PERMIT PROGRAMS: THE HAZARDOUS WASTE PERMIT PROGRAM

11. The authority citation for Part 270 continues to read as follows:

Authority: Sections 1006, 2002, 3005, 3007, 3019 and 7004 of the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act of 1986, as amended (42 U.S.C. 6905, 6912, 6925, 6939, and 6794).

§ 270.42 [Amended]

12. In § 270.42, the list of permit modifications in Appendix I.D.1 is amended by adding the following:

* * * * *

Modifications	Class
D. Closure:	
1. Changes to the closure plan: * *	
(g) Extension of the closure period to allow a landfill or surface impoundment unit to receive non-hazardous wastes after final receipt of hazardous wastes under §§ 264.113(d) and (e)	2
* * * * *	

[FR Doc. 88–12530 Filed 6–3–88; 8:45 am]

BILLING CODE 6560–50–M

Federal Register

Monday
June 6, 1988

Part V

Environmental Protection Agency

40 CFR Parts 232 and 233
Clean Water Section 404 Program Definition and Permit Exemptions; Section 404 State Program Regulations; Final Rule

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 232 and 233

[FRL-3214-1]

Clean Water Act Section 404 Program Definitions and Permit Exemptions; Section 404 State Program Regulations

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: We are hereby issuing final rules containing 404 program definitions and 404(f)(1) exemptions and the procedures and criteria used in approving, reviewing and withdrawing approval of State 404 programs. Part 232 contains definitions and exemptions related to both the Federal and State-run 404 program and Part 233 deals with State programs only. The revisions in these rules will provide the States more flexibility in program design and administration while still meeting the requirements and objectives of the Clean Water Act (the Act).

EFFECTIVE DATES: This final rule is effective on July 6, 1988. In accordance with 40 CFR 23.2, this regulation shall be considered issued for purposes of judicial review at 1:00 p.m., Eastern time on June 20, 1988.

FOR FURTHER INFORMATION CONTACT: Lori Williams, Office of Wetlands Protection (A–104F), U.S. Environmental Protection Agency, Washington, DC 20460, (202) 382–5043.

SUPPLEMENTARY INFORMATION: This final rule contains the 404 program definitions and 404(f)(1) permit exemptions in addition to the procedures and criteria used in approving, reviewing and withdrawing approval of 404 State programs. Part 232 basically recodifies the existing 404 program definitions and 404(f)(1) permit exemptions in a new, separate part of eliminate any confusion about their applicability. Part 232 applies to both the Federal and State programs. Part 233 revises the procedures and criteria used in approving, reviewing and withdrawing approval of 404 State programs. These final rules provide the States more flexibility in program design and administration while still meeting the requirements and objectives of the Act.

This rule was proposed on October 2, 1984 at 49 FR 39012. The notice invited public comments for a 60-day period ending December 3, 1984. On December 10, 1984 (49 FR 48064), the comment period was extended to January 2, 1985. Thirty-eight comments were received—15 State agencies, 10 environmental groups, 6 industry groups, 4 Federal agencies, and 3 others.

The comments covered the full range of views, ranging from those which indicated that more streamlining is required to those which indicated that the proposed regulations increased flexibility at the expense of environmental protection.

In addition to the more significant revisions described in the preamble, we have made minor editorial and content changes from the proposal. We have also renumbered the sections in Part 233 to close the large gaps in numbering in the proposal.

It is the agency's intent that 40 CFR Part 124 no longer applies to 404 State programs. We will be publishing technical, conforming regulations in the near future.

The following summarizes the major comments and EPA's response to them.

Response to Comments and Explanation of Changes

Part 232—404 Program Definitions, Exempt Activities Not Requiring 404 Permits

Section 232.2(b): In response to comment, we have revised the proposed definition of "application" for clarity.

Section 232.2 (e) and (f): The definition of "discharge of dredged material" and "discharge of fill material" were modified for consistency with the Corps regulations (33 CFR 323.2 (d) and (f)).

Section 232.2(j): We received comment that our definition of "general permit" is different from the Corps' definition (33 CFR 323.2(n)). The proposed definition was taken from the Act (404(e)(1)) and, therefore, has been retained in the final regulation.

Section 232.2(i): Under Section 404 of the Act, the Corps (and States approved by EPA) issue permits for discharges of dredged and fill material into waters of the U.S. Under Section 402, EPA (and States approved by EPA) issue permits for discharges of all other pollutants into waters of the U.S. In January 1986 the Corps and EPA entered into a Memorandum of Agreement (MOA) to resolve a longstanding difference over the appropriate Clean Water Act program to regulate certain discharges of solid wastes into waters of the U.S. The Corps issued its definition of "fill material" in 1977, which provided that only those solid wastes discharged with the primary purpose of replacing an aquatic area or of changing the bottom elevation of a waterbody are regulated under the Corps' 404 program. These discharges include discharges of pollutants intended to fill a regulated wetland to create fast land for development. The Corps' definition excludes pollutants discharged with the primary purpose to dispose of wastes which, under the Corps' definition, would be regulated under Section 402. Under EPA's definition of "fill material," all such solid waste discharges would be regulated under Section 404, regardless of the primary purpose of the discharger. The difference complicated the regulatory program for some solid wastes discharged into waters of the U.S.

The MOA provides an interim arrangement between the agencies for controlling these discharges. In the longer term EPA and Army agree that consideration given to the control of discharges of solid waste both in waters of the U.S. and upland should take into account the results of studies being implemented under the 1984 Hazardous and Solid Waste Amendments to the Resource Conservation and Recovery Act (RCRA). The main focus of the interim arrangement is to ensure an effective enforcement program under Section 309 of the Act of controlling discharges of solid and semi-solid wastes into waters of the U.S. for the purpose of dispoal of waste. When warranted, EPA will normally initiate section 309 action to control such unauthorized discharges. If it becomes necessary to determine whether Section 402 or 404 applies to an ongoing or proposed discharge, the determination will be based upon criteria in the agreement, which provide, *inter alia*, for certain homogeneous wastes to be regulated under the Section 402 Program and certain heterogeneous wastes to be regulated under the Section 404 Program, subject to certain criteria. This agreement does not affect the regulatory requirements for materials discharged into waters of the U.S. for the primary purpose of replacing an aquatic area or of changing the bottom elevation of a water body. Discharges listed in the Corps definition of "discharge of fill material" (33 CFR 323.2(1)) remain subject to Section 404 even if they occur in association with discharges of waste meeting the criteria in the agreement for Section 402 discharges.

Unless extended by mutual agreement, the MOA will expire at such time as EPA has accomplished specified steps in its implementation of RCRA. In the meantime, these regulations simply repromulgate EPA's existing definition of fill material.

Section 232.2 (q) and (r): Several comments were directed toward the

definitions of "waters of the United States" and wetlands." The commentors suggested that these definitions exceed the original intent of Congress.

The legislative history of the Act, from both 1972 and 1977, emphasizes Congress' intent that the jurisdiction of the Act over waters of the United States reflect the maximum extent permissible under the Commerce Clause of the Constitution. The specific definition of wetlands used in these regulations was originally promulgated in 1977 (prior to the 1977 Amendments to the Act) and has been approved in numerous courts, most recently by the Supreme Court in *U.S.* v. *Riverside Bayview Homes Inc.* (106 S.Ct. 455 (Dec. 4, 1985)). The overall definition of waters of the United States has also been approved by the courts, both in its current articulation and in earlier versions. Therefore, we see no need to change these definitions to narrow their coverage.

Several questions have arisen about this application of this definition to isolated waters which are or could be used by migratory birds and endangered species. As the Agency explained in an opinion by the General Counsel dated September 12, 1985, if evidence reasonably indicates that isolated waters are or would be used by migratory birds or endangered species, they are covered by EPA's regulation. Of course, the clearest evidence would be evidence showing actual use in at least a portion of the waterbody. In adition, if a particular waterbody shares the characteristics of other waterbodies whose use by and value to migratory birds as well established, and those characteristics make it likely that the waterbody in question would also be used by migratory birds, it would also seem to fall clearly within the definition (unless, of course, there is other information that indicates the particular waterbody would not in fact be so used). Endangered species are, almost by definition, rare. Therefore, in the case of endangered species, if there is no evidence of actual use of the waterbody (or similar waters in the area) by the species in question, one could actually assume that the waterbody was not susceptible to use by such species, notwithstanding the particular characteristics of the waterbody. However, in each case a specific determination of jurisdiction would have to be made, and would turn on the particular facts.

For clarity and consistency, we are adding the following language from the preamble to the Corps' regulations published on November 13, 1986 (51 FR 41217). This language clarifies some cases that typically are or are not considered "waters of the United States."

"Waters of the United States" typically include the following waters:

- Which are or would be used as habitat by birds protected by Migratory Bird Treaties; or
- Which are or would be used as habitat by other migratory birds which cross State lines; or
- Which are or would be used as habitat for endangered species; or
- Used to irrigate crops sold in interstate commerce.

For clarification it should be noted that we generally do not consider the following waters to be "waters of the United States." However, EPA reserves the right on a case-by-case basis to determine that a particular waterbody within these categories of waters is a water of the United States. Pursuant to agreements with EPA, the permitting authority also has the right to determine on a case-by-case basis if any of these waters are "waters of the United States."

Non-tidal drainage and irrigation ditches excavated on dry land.

- Artificially irrigated areas which would revert to upland if the irrigation ceased.
- Artificial lakes or ponds created by excavating and/or diking dry land to collect and retain water and which are used exclusively for such purposes as stock watering, irrigation, settling basins, or rice growing.
- Artificial reflecting or swimming pools or other small ornamental bodies of water created by excavating and/or diking dry land to retain water for primarily aesthetic reasons.
- Waterfilled depressions created in dry land incidental to construction activity and pits excavated in dry land for the purpose of obtaining fill, sand, or gravel unless and until the construction or excavation operation is abandoned and the resulting body of water meets the definition of waters of the United States.

Section 232.3: The 1977 Clean Water Act provided for specific exemptions (404(f)(1)) from permitting requirements. EPA's 1980 Consolidated Permit Regulations promulgated regulations spelling out the scope of the exempted activities. The October 2, 1984, publication proposed several substantive revisions to the 404(f)(1) exemptions, as well as organizational changes. This rulemaking finalizes the organizational changes, but finalizes only one of the proposed substantive revisions. That revision substitutes "one year from discovery" for the previous "one year from formation" in § 232.2(d)(3)(i)(D), which exempts as minor drainage certain discharge of dredged or fill material incidental to the emergency removal of sandbars, gravel bars, or other similar blockages. This rule also includes the revised irrigation ditch provision which was the subject of a separate rulemaking (40 CFR 233.35(a)(3), December 20, 1984). Additionally, we have made the note following § 232.3(b) more explicit to clarify that a conversion of wetlands to non-wetlands is (and has been) considered a "change in use." Apart from these changes, it appears, based on the comments received, that the regulated sector is familiar with the existing language and that no additional clarification or improvement is now needed.

One commenter suggested that the Best Management Practices (BMPs) for the exemption from permitting for construction or maintenance of farm roads, forest roads or temporary roads for moving mining equipment are complex and difficult to administer and should be left to negotiation between the State and EPA for inclusion in the Memorandum of Agreement (§ 233.13). These BMPs are the same BMPs that are required for exemption from Federal permitting requirements. These BMPs were promulgated in 1980 and have not been the subject of significant comment or complaint since then. A discharger under an approved State program should meet the same requirements as under the Federal program.

Part 233—State Section 404 Program Assumption Regulations

We received several comments expressing concern that the proposed regulations would weaken Federal responsibilities, such as those in the Fish and Wildlife Coordination Act, Endangered Species Act, and National Environmental Policy Act. When a State assumes the 404 permitting responsibility, these statutes usually no longer apply, since these statutes only apply to Federal actions. When a State assumes the program, the permit decision is a State action, not a Federal action. However, a Federal oversight role is clearly established by section 404(j) of the Act. Therefore, the altered Federal role after program approval is a function of the statutory scheme, not these regulations.

Section 233.1: Several comments were received on partial State programs, ranging from the view that partial programs should not be allowed to the

view that it is desirable to approve partial programs. The commentors identified partial programs in terms of geographic extent or scope of activities regulated. EPA interprets the Act as requiring State programs to have full geographic and activities jurisdiction (subject to the limitation in section 404(g)). While specific authorization for partial programs under section 402 was enacted in the Water Quality Act of 1987, no similar provision was added for section 404. Accordingly, partial 404 programs are not approvable. Because of the special status of Indians, a lack of State authority to regulate activities on Indian lands will not cause the State's program to be considered a partial program.

We encourage States to begin working with the Federal land-owning agencies (i.e., Forest Service, Bureau of Land Management, and National Park Service to name a few) early in the program development stage. This should eliminate or reduce any confusion that may develop, since subsequent to program approval, the State will assume 404 permitting responsibility in these lands.

In response to comments, we have clarified that States may have a program that is more stringent or extensive than what is required for an approvable program. Under State law, and not as part of its approved program, States may also regulate discharges into those waters over which the Corps retains jurisdiction. Those parts of the State's program that go beyond the scope of Federal requirements for an approvable program are not subject to Federal oversight or federally enforceable. Of course, while States may impose more stringent requirements they may not compensate for making one requirement more lenient than required under these regulations by making another requirement more stringent than required.

Section 233.3: One commentor requested that we limit confidentiality only to that information that does not relate to adverse effects on the aquatic environment. As these regulations conform to EPA's general regulations on confidentiality of information (40 CFR Part 2), we did not make the requested change.

Section 233.4: In the preamble to the proposed rulemaking, we specifically sought comment on the conflict of interest section. Several comments were received on this topic, the vast majority of which supported the need for a conflict of interest provision. However, several commentors did suggest that some flexibility should be added into this section.

The current language is derived from the requirements for an approvable NPDES program. However, State 404 programs should not be held to the same conflict of interest standards as State NPDES programs because of factual differences between the two programs. NPDES discharges are usually long term discharges, often from certain specific types of industrial or municipal dischargers. Discharges authorized by section 404 typically tend to be one time, of shorter duration, and by a wider range of dischargers than NPDES, ranging from private citizens to large corporations, from small fills for boat docks or erosion prevention to major development projects. Therefore, an absolute ban on anyone with a financial interest in a permit from serving on a board that approves permits is likely to be more difficult to comply with under the 404 program than under the NPDES program because under the NPDES criteria, so many people would be considered to be financially interested in 404 permits that the pool of potential 404 board members would be unreasonably small. In addition, because of the nature and size of the discharge, 404 dischargers will often have less at stake financially than 402 dischargers.

Therefore, we have simplified the conflict of interest section from what was proposed. The final rule does not prohibit a person with an interest in a 404 permit decision from generally participating on a board which makes decisions on permit issuance or denial. However, anyone with a direct personal or pecuniary interest in a particular permit decision *must* make such interest known and must *not* participate in that permit decision. This new language allows more latitude in who may serve on a board, but still provides that there not be a conflict of interest or appearance of conflict of interest in any particular permit decision. This language effectuates the basic intent of the NPDES criteria, by ensuring that board members are disinterested decisionmakers.

Section 233.10: In response to comment, we have clarified our original intent that copies of State statutes and regulations submitted as part of a State's submission include statutes and regulations concerning the State's applicable administrative procedures.

Section 233.11: Several comments addressed the need for additional information in the program description. These commentors were concerned that there may be insufficient information available to determine a program's adequacy. These regulations reflect EPA's view that a complete program description is essential for determining the adequacy of a State's program. A State's program must be at least as stringent and extensive as the Federal program. In response to these comments, we have specified certain information that must be included in the scope and structure of the State's program. The description of the scope and structure of the State's program must include a detailed description of the extent of the State's jurisdiction, scope of the activities regulated as well as the scope of permit exemptions (if any), anticipated coordination, and the environmental permit review criteria.

Section 233.11(h) clarifies the requirements for a description of the State's jurisdiction. As part of the program description, the State must describe separately the waters it will assume after program approval and the waters retained by the Corps. This should make it easier for the public to understand the split jurisdiction between the State and the Corps.

We do not concur with the comment that, in addition to a description of funding and manpower available for program administration, the program description should include formal assurance from the Governor that the level of funding is sufficient to provide for an effective program. However, we have reinstated the existing requirement that the State provide an estimate of the anticipated workload. This should provide the information needed to determine if the State has sufficient manpower to adequately administer a good program. If there is insufficient funding or manpower for an adequate program, this will become evident either in review of the program submission or in the annual review of an approved program.

Section 233.13: In response to comment, we have specified that, if more than one State agency has responsibility for program administration, all the involved State agencies must be parties to the Memorandum of Agreement (MOA) between the State and EPA's Regional Administrator. This requirement is in the existing regulations, but had been eliminated in the proposal. Restoring this requirement ensures that all State agencies responsible for program implementation are fully aware of their responsibilities.

One commenter suggested we use the MOA to establish procedures to withdraw a permit from State processing prior to any State action on the application. We do not agree with this suggestion. Except for one situation provided for in Section 404(j), only the

State may issue a permit for discharges in State regulated waters.

We do not agree with the comment that the proposal fails to ensure adequate coordination of EPA and State enforcement activities, as it requires the MOA to address State and EPA roles and coordination on compliance monitoring and enforcement activities. The purpose of formalizing this aspect of the State's program in an MOA is to assure adequate coordination on compliance monitoring and enforcement activities. As part of the State's program submission, this MOA is subject to public comment. If there is any question on the adequacy of a particular program, it should become apparent during Federal agency and public review.

Many commentors expressed concern about the provision for waiver of Federal review. Many were concerned that the waiver provision would be abused and that environmental protection of the resources would suffer. Several commentors were concerned that inappropriate categories would be waived. We feel that use of this waiver provision will reduce workload and paperwork and focus Federal resources where they are most needed and appropriate. Specific waivers will be available for public review and comment prior to program approval.

This final regulation eliminates a separate section on sharing of information (former 40 CFR 233.29), since the MOA with the Regional Administrator is already required to address State submittal of information to EPA and EPA access to State records, reports and files relevant to the program. We feel this adequately serves the purpose of 40 CFR 233.29.

Section 233.14: In response to comments, we have, as in the previous section, now specified that all State agencies responsible for program administration must be parties to the Memorandum of Agreement between the State and the Secretary.

EPA has also added a note encouraging States to use this MOA to establish procedures for joint processing of Federal and State permits. Several comments requested that joint processing be made mandatory. While we agree that joint permit processing may be very beneficial to the regulated public, we cannot make this a condition to an approvable program. However, we will continue to strongly encourage States to look into the possibility of joint processing.

In response to comment, we have retained the existing requirement that, if States plan to assume existing Corps general permits, this MOA must include procedures for transferring the support files for these general permits from the Corps to the State. This will facilitate State oversight of such general permits.

One commentor was concerned that the regulations eliminated a provision for procedures to ensure the State did not approve permits on the basis of incomplete applications transferred by the Corps. This provision was deleted as unnecessary. Once a State assumes the program, it is responsible for fulfilling all permitting requirements, including public notice. The regulation requires that sufficient information be available to meet the information requirements for public notice and for assessing the impacts of the discharge. Therefore, the State must either deny incomplete applications or take steps to get the complete information.

Section 233.15: The Act establishes a 120-day time clock for EPA decision on a State's request for program approval. The final regulation clarifies that this statutorily mandated time period starts on EPA's receipt of a complete program submission. If the State significantly changes its submission during the review period, the time clocks starts over upon EPA's receipt of the revised submission. The review period may be extended upon agreement of the State and EPA.

We cannot agree to the suggestion that the regulation lengthen the public comment period and notice of public hearing for decision on a State program. The Act is very specific on the timeframe for this decision. If a decision is not made within the 120 days timeframe, the State's program is automatically approved. EPA cannot make a decision within the mandated 120 days of receipt if these time frames are extended. Of course, as noted earlier, a State may agree to extend the time period for program approval; in that event, additional time could be provided for public participation within that State.

EPA will make its decision to approve or disapprove the State's program within the statutorily mandated timeframe. However, if approved, the State's program will not be effective until the notice of approval is published in the **Federal Register.**

Many comments were received on the delegation of authority to the Regional Administrator to approve/disapprove State programs. Most commentors were concerned about national consistency among the States' programs. The Delegation Manual, which formalizes this delegation of authority, requires that the Regional Administrator approving a State program must obtain the concurrence of two EPA headquarters offices—Office of Water and Office of General Counsel. This should ensure the desired national consistency.

EPA has added language to make it explicit that programs shall be approved or disapproved based on whether the State's program fulfills the requirements of this regulation and the Act.

This rule also clarifies that EPA will use existing State, Corps, FWS and NMFS mailing lists as the basis for mailing notices about the State's request for program approval.

A summary of significant comments received and response to these comments will be prepared by the Regional Administrator prior to decision on a State's program. Since there are already specific requirements for public notice and public hearing, there is no need for (and we have deleted the requirement for) the responsiveness summary itself to describe the public participation activities or matters presented to the public.

Section 233.16: This rule clarifies that it is the State's obligation to keep the Regional Administrator informed of any proposed or actual changes to the State's approved program.

We rejected the suggestion that if a State must amend or enact new legislation to comply with any modification in Federal regulation, the change must be promulgated within one year of the modification. A two year time period was chosen because many State legislatures do not meet every year. A one-year deadline for these States would be impossible to meet.

We also do not agree with the suggestion that minor revisions to an approved State program should undergo as much review and/or coordination as substantial program revisions. As the name (minor revision) implies, these program changes will not have a significant impact on the program or the environment. Of course, if there is question in EPA's mind about whether a proposed revision is minor or substantial, the revision shall be considered substantial and undergo full review specified for an original application.

Section 233.21: Several commentors questioned the legality of State issued general permits. Sections 404 (g), (h) and (j) of the Act authorize this type of State permit.

Many commenters were received on general permits. States have the option of assuming administration of Corps' existing general permits. If they choose to exercise this option, the State is responsible for ensuring discharges comply with any existing permit conditions and any reporting, monitoring

or predischarge requirements. The Corps shall provide the State copies of the support files for any general permits assumed by the State.

One commentor questioned the advisability of EPA approving transfer of some existing Corps general permits to a State. EPA cannot ignore Sections 404 (g)(1) and (h)(5) which provide for a State to assume existing general permits. If a State with an approved State program proposes renewal of any permits that have not worked well, EPA will comment/object to these proposed permits, as appropriate.

Several commentors expressed satisfaction with the Corps' existing general permits. These commentors expressed concern about the States not assuming such existing general permits and about their opportunity for participation in such a decision. It is the State's prerogative not to assume any of the existing general permits. However, if, at the time of initial program assumption, the State does not intend to assume existing Corps general permits, this will be noted within the program submission and will be subject to public comment and public hearing as part of the approval process. Failure to assume existing Corps general permits does not constitute a partial program, since the State will process individual permit applications for those discharges previously authorized by general permit. Any Corps general permit not assumed by the State will remain in effect, for purposes of the Clean Water Act, until its normal expiration date, unless revoked or modified sooner by the Corps under its procedures. If subsequent to program approval the State decides to revoke or modify a general permit it has assumed, the normal revocation procedures will apply.

Many comments were received on predischarge notification requirements for general permits. Some commenters agreed that notification should be determined on a permit-by-permit basis; others felt that such notification should be required on all general permits. This rule adopts the proposal that notification requirements be established on a permit-by-permit basis. For instance, prenotification or reporting may be required in areas where there is a likelihood for individual or cumulative adverse effect on the environment because of discharges conducted under a general permit. All draft general permits will be reviewed by EPA and the other Federal review agencies as well as the general public. If during the review of a particular draft general permit, EPA determines that notification provisions are appropriate to ensure compliance with the 404(b)(1) Guidelines, we will so state in the Federal comments to the State. This ensures that notification requirements will be included where in fact appropriate.

The Department of the Interior requested that we require a 30-day prenotification requirement on any discharge pursuant to a general permit that may impact units of the National Park System, National Wildlife Refuge System, National Fish Hatchery, Reclamation project lands, Indian Reservation and Trust lands, and public lands under the jurisdiction of the Bureau of Land Management. We do not feel at this time that there is a basis for automatically requiring such prenotification. If there is a need for prenotification for a particular permit, it may be specified through the Federal comment on the draft permits and will therefore be included in the issued general permit, in accordance with § 233.50.

Several commentors requested that we retain limits on any single operation conducted under a general permit. We agree that this is appropriate. Subsection 233.21(c) (1) and (2) require each general permit to have limits on the size and location and type of fill for any single operation, sufficient to ensure minimal adverse environmental effects when performed separately and minimal cumulative adverse effects, as required by Section 404(e).

One commentor was concerned that we had deleted all the standard permit conditions (§ 233.23) for general permits. Section 233.21(c) (1) and (2) recapture the main items of § 233.23(c)(1) such as specific description of activities authorized including limitations for any single operation and precise description of geographic area to which the general permit applies including any limitations where operations may be conducted. The only part of § 233.23 (Permit conditions) that does not apply for general permits is § 233.23(c)(1), which is not applicable because it refers to items that are pertinent only to individual permits (e.g. name and address of permittee).

Several commentors suggested that the Director should show cause for invoking discretionary authority to require an individual permit. This regulation specifies that discretionary authority may be based on concerns for the aquatic environment including compliance with these regulations and the 404(b)(1) Guidelines. Section 510 of the Act preserves the Director's right to impose more stringent requirements, i.e., to invoke discretionary authority for other reasons under State law. Once the Director notifies a discharger that he will exercise discretionary authority to require an individual permit, the activity is no longer authorized under the general permit. If the activity continues after notification, the discharger is subject to enforcement action.

Section 233.22: In response to comments requesting more specific permit conditions, we have clarified that emergency permits, to the extent possible, should incorporate all applicable permit conditions (§ 233.23), including restoration of the site. We have also retained the provision that emergency permits shall be limited to duration of time needed to complete the authorized emergency action.

We do not agree with the comment that the Regional Administrator must show cause to terminate an emergency permit. The Regional Administrator never terminates permits. The Director may terminate an emergency permit if he determines such an action is necessary to protect human health or the environment.

Section 233.23: Each permit shall have conditions which assure compliance with all applicable statutory and regulatory requirements. If any of these requirements change, the permit conditions must be modified as needed to assure compliance with the revised requirements.

In response to comments, we have added a requirement that the permit contain conditions which assure that the discharge will be conducted in a manner which minimizes adverse impacts on the physical, chemical and biological integrity of the waters of the United States. This is a reiteration of the requirements in the 404(b)(1) Guidelines (§ 230.10(a)). Restoration and mitigation may be considered as mechanisms for reducing adverse impacts in appropriate circumstances.

One commentor expressed concern about the proposed deletion of the permit condition referring to BMP's approved by a Statewide 208(b)(4) agency. If a State has an approved 208 program, these requirements would be covered by § 233.23(a), which requires the Director to establish conditions which assure compliance with all applicable statutory and regulatory requirements, so there is no need for a separate reference to the BMP's.

In response to comment, we have retained the requirement for a permit condition explaining that a permit violation is a violation of the Act as well as of State statutes or regulations, as this reminder may enhance compliance.

We also have expanded § 233.23(c)(6) to require the permittee to provide the Director information to determine whether cause exists for permit revocation or termination as well as modification.

We concur with the comment that the Director or his authorized representative should have proper identification before they can enter the premises or inspect any records. We believe this is reasonable and have added this to the final regulation.

One commentor requested that the regulation require more specific identification of the disposal site. We feel that between the existing requirements for permit application, public notice and permit conditions, the disposal site will be adequately identified. However, as a safeguard, we have added that the description of the project on the issued permit must include a description of the purpose of the discharge.

Section 233.24 (Effect of a permit). This section has been deleted as unnecessary. The statements in this section were simply facts which do not need to be included in regulations to be in effect.

Section 233.30: Many comments were received on the State application form. A number expressed concern that there would not be enough information available to evaluate the potential impacts of the discharge activity. We have accordingly revised this section to generally reflect the same application information requirements contained in the Corps' current regulations (33 CFR Part 325). Under this approach, State assumption of the program should not result in any change in either the kind of information available for review or the burden upon the applicant to supply the information. In addition, a requirement for certification that all information contained in the application is true and accurate has been added to § 233.30(b)(4).

Several commentors requested that we include the publicity and pre-application consultation requirements in the regulations. As noted in the preamble to the proposed rule, we agree that publicity and preapplication consultation are beneficial; however, they are not required for an approvable program. We will continue to encourage States to include them in their programs.

Section 233.31: In response to comment, this section has been simplified from proposed § 233.61; it now simply requires coordination with other States whose waters may be impacted by the discharge and coordination with Federal and Federal-State water related planning and review processes, without attempting to list such processes. These planning and review processes may include, but are not limited to, coastal zone management plans, 208 areawide plans, Continuing Planning Process (§ 303(e)), and advanced identification (40 CFR 230.80). The coordination procedures will likely vary from State to State. The State's anticipated coordination shall be included in the program description. EPA will carefully scrutinize the anticipated coordination to assure it is adequate.

Comments were received suggesting that we require States to incorporate into their programs information developed by FWS' National Wetlands Inventory (NWI). While we agree that this information would be very useful in administering a State's program and encourage States to take advantage of it, it should not be mandatory for States to incorporate this information in their programs. The NWI was not developed for regulatory purposes. Additionally, the FWS did not use EPA's definition of wetlands in the NWI; therefore, the "NWI wetlands" and the "404 wetlands" may not always coincide.

Several commentors were concerned that the lack of specificity of coordination requirements would weaken State programs. While these regulations do not list specific entities (agencies) that must be coordinated with, we will carefully evaluate the coordination aspects of each State's program prior to decision on approval/disapproval. While we anticipate that the State's permitting agency will coordinate with State fish and game agencies, this is not required by the Fish and Wildlife Coordination Act (FWCA). Once a State assumes the 404 permitting responsibility, that Act no longer applies in the permitting process since permitting becomes a State (not Federal) action. The FWCA will still require coordination with FWS whenever a State-issued permit is issued to a Federal agency or facility. However, it must also be remembered that States must assure compliance with the 404(b)(1) Guidelines which provide for protection of fish and wildlife resources. EPA is responsible for soliciting comments from the Corps, FWS, and NMFS, and commenting to the States.

Section 233.32: Many comments were received on proposed § 233.62 (public notice), some in support of and others opposed to shortening the public comment period. The final rule provides for a public comment period at least comparable to that under the Federal program. The existing Corps' regulations (33 CFR Part 325.3) specify a public notice period of "A reasonable period of time, normally thirty days but not less than fifteen days from date of mailing." Today's rules specify "* * * a reasonable period of time, normally 30 days," and allows approving a program that allows less than a 30 day public comment period if the Regional Administrator determines that "sufficient public notice is provided for." The Regional Administrator must carefully consider all aspects of a State's program in regard to public involvement, including how extensive the State's mailing list is, whether notice is published in area newspapers, what the actual length of the comment period is, whether the shorter time period is for all projects or just certain categories of discharge. We anticipate that comment periods would not be shorter than 20 days, and we will carefully scrutinize any that are less than 30 days.

Several comments on the content of the public notices were also received. These comments objected to the lack of specificity of the information required to be included in the public notice. In response to these comments, the information requirements for public notice have been changed. These regulations incorporate much of the language in the Corps' existing regulations (33 CFR 325.3.) Therefore, there should be no net change in the information available to evaluate a proposed discharge from the existing Federal program to an approved State program.

We have modified the requirement on who must automatically be mailed notice of a permit application. While the notification may vary depending on the type and location of the project, certain notifications, such as the local governmental agency, should be routine. Other notifications that may be useful include historic preservation and coastal zone management offices.

In response to comments, we have also clarified that anyone may request to be put on a mailing list to receive copies of public notices.

One commentor suggested that we make it clear that information obtained in response to the public notice will be taken into consideration as part of the environmental assessment to determine if an environmental impact statement (EIS) should be prepared. We have not included this language since, once a State assumes the permitting responsibility, the National Environmental Policy Act (NEPA) no longer applies. NEPA applies to Federal actions. When a State assumes the program, the permit decision is a State action, not a Federal action. While many States have a State law equivalent to

NEPA, it is not the function of these regulations to address EIS requirements under such State laws.

Section 233.33: This provision has been rewritten to clarify how the transcript of public hearings will be made available to the public.

Section 233.34: Several commentors expressed concern that requiring the State to prepare a written determination for each permit is excessive paperwork. We do not concur with this view; we feel that a written determination is needed for each permit decision to ensure proper evaluation and to facilitate subsequent review. Therefore, these regulations contain the requirement that the Director must prepare a written determination for each permit application outlining the decision and the rationale for the decision. Of course, in accordance with § 230.6 of the Guidelines, the level of detail may be tailored to the circumstances.

Any State environmental review criteria must be at least equivalent to the 404(b)(1) Guidelines for an approvable program. The 404(b)(1) Guidelines were the subject of an Advanced Notice of Proposed Rulemaking (ANPRM) (47 FR 36798) published August 23, 1982, to solicit comments and examples of alleged problems with these Guidelines. At this time, EPA has not found sufficient basis for revising the Guidelines. Therefore, States must assure compliance with the current Guidelines, as required in section 404(h)(1)(A)(i).

We do not concur with the suggestion that we establish specific deadlines for State decision on an application. The only deadlines in this regulation are those which relate to the statutorily mandated timeframes for Federal review of an application.

Section 233.35: The final regulation simply requires signature by both the applicant and the Director, and does not specify the sequence in which they sign. However, EPA anticipates that, if the project is controversial or if the permit conditions are restrictive, the Director may wish to require the applicant to sign the permit to indicate acceptance of its terms prior to the Director's signature.

Section 233.36: These regulations simplify the procedures for modification, suspension and revocation of permits. State procedures to handle these situations shall be approved if there is opportunity for public comment, coordination with the Federal review agencies, and opportunity for public hearing. Language has been added (§ 233.36(b)) specifying that permit modification must be in compliance with § 233.20 (Prohibitions).

The 402 State program regulations handle modifications differently than these 404 State Program Regulations. 40 CFR 122.62 provides an exclusive list of grounds which justify the modification of a 402 State permit. Section 233.36 does not. This difference between the two programs is appropriate for the following reasons. First, the 402 program has a long history of litigation concerning reopener and the five year maximum permit term; the 404 program does not. Second, the 402 program generally regulates continuous discharges; consequently, there is great concern with balancing the permittee's need for certainty and continuity against the program's need to impose more stringent standards. The 404 program, however, tends to regulate short-term discharges, and thus the permittee's need for continuity is much less than it is in the 402 program. Consequently, the 404 programs may facilitate permit modification by States where the 402 program can not.

One commenter expressed concern about use of abbreviated review procedures for modification of permits for minor modification of project plans that do not "significantly" change the character, scope and/or purpose of the project or result in significant change in environmental impact. The commenter was concerned that the use of the word "significant" was too vague and allowed a procedural loophole to avoid public and agency review. The key word in this sentence is "*minor*" modification. Things that will be evaluated in making the decision on whether the project modification is minor are whether there is any change in project purpose, or any change that increases the amount of dredged or fill material, or any change that enlarges the scope of the project. We anticipate that, if there is any question about the need for public and agency review of a project modification, the State will initiate full review procedures.

Section 233.37: In the preamble to the proposed regulation (49 FR 39015) we noted that the requirements concerning who must sign may not necessarily be appropriate for the 404 program. The language in the proposal was the result of a settlement agreement (*NRDC* v. *EPA*, and consolidated cases [No. 80–1607 (D.C. Circuit)]). All the comments received on this subject agreed that the proposed signature requirements are appropriate for NPDES discharges, but are too inflexible and are not really appropriate for 404 discharges, since most 404 discharges are a one time discharge and on a relatively small scale. We concur with these comments. Therefore, this final regulation incorporates the signatory requirements contained in the Corps' current regulations (33 CFR 325.1). Thus, there will be no change from the existing Section 404 requirements when a State assumes the program.

The certification that all statements contained in the application or other documents are true and accurate and that there are penalties for submitting false information has been removed from this section to § 233.30 (Application for a permit). Section 233.41(a)(3)(iii) also addresses this certification in that it provides for authority to seek criminal fines against any person who knowingly makes false statements in any application, record, report, plan or other document filed or required to be maintained under the Act, these regulations or the approved State program.

Section 233.38: One commentor requested that if a State permit application has been submitted in a timely manner, an existing Federal permit should be continued beyond its expiration date until a State permit is issued. The provision in the Administrative Procedures Act for continuing Federal permits does not apply in this setting. Therefore, such continuation may be accomplished only through State law. These regulations allow but do not require the State to have such authority. We cannot mandate that this be a requirement for an approvable program.

Section 233.40: The compliance evaluation provision has been rewritten from the existing regulation to simplify it and to provide additional flexibility. We continue to believe that compliance evaluation is an important component of an effective Section 404 program. Therefore, the previous provisions (40 CFR 233.27 (1984)) should be considered as guidance in interpreting the new streamlined language.

We do not agree with the comment that State agency authority to "* * * enter any site or premises subject to regulation" is excessive or may violate civil rights. This provision does not override applicable warrant requirements or other safeguards. Of course, if State requirements so constrain the State's right of entry that the State lacks meaningful authority to inspect, the program would not be approvable. (We are not presently aware of any States where there would be this problem, however.)

Section 233.41: Many comments were received on the proposed alternative requirements for authority to assess civil and criminal fines of a specific amount. The comments ranged from approval of

the alternative concept to concern about weakening State enforcement capability. This regulation promulgates the proposed subsection allowing approval of a State program without the specific monetary penalty authority if it has a demonstrably effective alternative enforcement mechanism.

We are interested in ensuring that State programs have strong enforcement capability, since it is not desirable for EPA to constantly overfile in State enforcement actions. Because the Act does not specify that a State must have penalties equal to the Federal penalties or at any other particular level for an approvable program, EPA has substantial discretion in deciding what is sufficient State enforcement authority. These regulations establish monetary penalties for which the State must have the authority to assess; they need not be assessed by the State for every violation. These amounts are approximately half those EPA is authorized to assess.

If a State cannot fulfill these monetary penalty requirements, it can still have an approved program if EPA is satisfied that it has "an alternate, demonstrably effective method of ensuring compliance." However, even under the alternative enforcement program provision, States must still have the authority to assess both civil and criminal penalties, although the amounts may not equal those required by § 233.41(a)(i)–(iii).

Before approving any alternate enforcement mechanism, the Regional Administrator (RA) will carefully evaluate the State's proposed alternative enforcement mechanism to ascertain the effectiveness of the proposed alternative. The State's program must have a clear history of demonstrated effective deterrence, while also having direct punitive value. Programs will have to be in effect for at least one year prior to formal application for program approval in order to have a sufficient track record for evaluating effectiveness.

An effective, strong restoration program is the type of enforcement program that would be given serious consideration as an alternative under this provision. Being of a solid nature, 404 discharges tend to stay where originally placed, making restoration of illegally filled areas more feasible for 404 discharges as compared to 402 discharges. Most 404 discharges are a one time discharge, of relatively short duration, and on a relatively small scale. This lends more credence to restoration working as an alternative enforcement mechanism which can serve to protect the environment, deter future violations, and penalize the violator.

A key aspect that the RA must consider in determining effectiveness is whether the alternative program has an equivalent deterrence effect as would assessment of monetary penalties. The alternative approach must be strong enough to cause a violator to cease any and all illegal activities. It must also deter others from violating the State's permit program. How effective the alternative mechanism will be in preventing and restoring any environmental damage will also be considered by the RA in making a decision on approval/denial of a State's alternative enforcement program.

The enforcement authority which a State must have in order for a Section 404 program to be approved is essentially the same enforcement authority it must have to administer an NPDES program under the Act. If a State lacks authority to recover penalties of the levels required under § 233.41(a)(3)(i)–(iii), EPA will review a State's authority to assess penalties in light of the State's ability to provide other incentives to compliance and deterrence to noncompliance. EPA intends that penalties for violations of Section 404 programs will provide general and specific deterrence. Penalties assessed in State administered programs should persuade the violator to take precautions against falling into noncompliance again, deter violations by others, and restore economic equity to regulated parties who have complied with Section 404 requirements. Penalties assessed in a State program should, at a minimum, recapture the economic benefit that a violator has wrongfully obtained. In support of its application for program approval, a State may provide information regarding its authority to obtain money judgments from Section 404 violators under equitable theories such as restitution and unjust enrichment.

Any proposed alternative enforcement mechanism will be available for public comment as part of the State's program submission. We are concerned about national consistency in administration and effectiveness of State programs. Therefore, we must stress that approval of an alternate enforcement mechanism will not be undertaken lightly. States should continue to try to meet the existing monetary penalty requirements.

In these regulations we have added a reporting requirement for States using the alternative enforcement authority. Under final § 233.41(d) the State must keep the Regional Administrator informed of all enforcement actions carried out under the alternative provision. The manner of reporting will be established as part of the State's submission in the Memorandum of Agreement with the Regional Administrator. This reporting requirement will enable EPA to closely monitor the effectiveness of the State's enforcement program and to determine any need for EPA overfiling in State enforcement cases and/or action under Section 309.

In response to comment, we have retained the requirement that the burden of proof for State enforcement cases shall be no greater than the burden of proof required of EPA.

One commentor suggested that any intervention in a State enforcement action must include some showing of justification. This regulation adopts the proposal which allows intervention "* * * by any citizen having an interest which is or may be adversely affected." We feel this adequately answers the suggestion.

One commentor requested that EPA prescribe procedures for any affected person to initiate legal action in State or Federal court against the Director, the permittee, or anyone operating in noncompliance with a State program. This would be comparable to the citizen suit provision in Section 505 of the Act. While such a provision might strengthen a State program, there is no such statutory requirement for an approvable program. However, we do anticipate that many States will have some form of citizen suit provisions.

Subpart F—Oversight Policy

Many Federal environmental programs were designed by Congress to be administered at the State level wherever possible. EPA's policy has been to transfer the administration of national programs to State governments to the fullest extent possible, consistent with statutory intent and good management practice. The clear intent of this design is to use the strengths of Federal and State governments in a partnership to protect public health and the nation's air, water, and land. State governments are expected to assume primary responsibility, while EPA is to provide consistent environmental leadership at the national level, develop general program frameworks, establish standards as required by the legislation, assist States in preparing to assume responsibility for program operation, provide technical support to States in maintaining high quality programs, and ensure national compliance with environmental quality standards.

The relationship between EPA and the States under assumption of the Section 404 Program is intended to be a partnership. Both EPA and the States have continuing roles and responsibilities under assumed State 404 programs. EPA remains responsible to the President, the Congress and the public for progress toward meeting national environmental goals and for ensuring that the Clean Water Act is adequately enforced. Thus, EPA's policy to transfer management responsibilities for environmental programs to State governments carriers with it a corresponding EPA responsibility to assure the objectives of the Federal law are achieved.

Evaluation of approved State 404 programs will generally focus on overall program performance and identifying patterns of problems. However, there will be some cases where EPA (and other Federal agency) participation in an individual State permit decision will be appropriate. Section 404(j) specifically provides for Federal comment on individual permit applications.

However, based on our general policy and our specific experience with Michigan's Section 404 program, the provision for waiver of Federal review (§ 404(k)) will be exercised to focus permit-specific oversight primarily on proposed discharges with potentially serious adverse environmental impacts. Review of Michigan's assumed program clearly illustrates that Federal review was waived in the vast majority of cases. In 1985, approximately 1% of the permit applications received Federal review; in 1986, approximately 1.5%.

We expect to issue guidance on Federal oversight of approved State programs under these regulations. This will include guidance on identifying and describing categories of activities eligible and appropriate for waiver of Federal review, emphasizing reasonable waiver initially, followed by increasing waiver over time based on experience with the State 404 Program. Thus, as experience demonstrates that a State is effectively administering its approved program, so as to comply with all national requirements, it is expected that additional waivers will be developed, replacing more individual permit review with periodic programmatic review. This periodic review will usually be conducted on an annual basis, but may be more frequent, as necessary or appropriate. EPA intends that other Federal agencies with responsibility under Section 404 will have an opportunity to participate in State program review activities and in the determination of what changes to such review would be appropriate.

Section 233.50: Several commentors expressed concern that too much time is allowed for Federal review of State permit applications. The final regulations retain the proposed time frames because they are based on Section 404(j) of the Act. However, the regulations do allow for the times to be shortened by mutual agreement of the Federal agencies and the State.

Several commentors questioned why EPA receives the public notice from the State and distributes the notice to the Federal agencies. The Act establishes EPA as the Federal focus of contact with the State. However, if the State, with the goal of streamlining, wants to provide copies of the public notice directly to all the Federal agencies, this can be accommodated within the Memorandum of Agreement with the Regional Administrator (§ 233.13). In either case, the comments from the Federal review agencies will be forwarded to EPA to consolidate the Federal comment to the State.

In addition to the public notice and draft general permit, the Regional Administrator shall forward to the Corps, FWS, and NMFS any other information pertinent to making an informed comment that the States makes available to him.

This regulation eliminates the requirement that States prepare draft individual permits. Draft general permits must be prepared (§ 404(j) refers to a copy of each proposed general permit) but there is no comparable statutory requirement for draft individual permits. Moreover, draft permits are not prepared as part of the current Federal program. Public review of individual permit applications is currently based on the public notice; public review subsequent to State assumption will also be based on public notice. Therefore, there will be no substantial change from existing procedures.

One commentor questioned why the public notice was circulated to EPA for Federal review instead of the permit application (§ 404(j)). The public notice usually contains all the pertinent information in the permit application (§ 233.32(d)). Under the Corps administered program, public and Federal review is normally based on the public notice; therefore, there will be no significant change from current practice. In addition, under either the Federal and State programs, EPA can request a copy of a particular application if it has a need for it.

In response to comment, we have reinstated the provision that if the Regional Administrator notified the Director within 30 days of receipt of the public notice that there is no comment, he may reserve the right to object within 90 days of receipt of the notice based on new information brought out by the public during the comment period or at a hearing.

Contrary to several comments received, the regulation already provides that the State shall provide a copy of every issued permit to the Regional Administrator (§ 233.50(a)(4)). These issued permits will be reviewed for compliance with the requirements for an approvable program, as part of EPA's overall oversight.

One commentor suggested that our provision for the Regional Administrator to consolidate comments for the Federal agencies conflicted with Section 404(h)(1)(H). However, Section 404(j) specifically assigns this coordination/consolidation role to EPA's Regional Administrator. This section clearly establishes EPA's Regional Administrator as the Federal focus for approved State programs. After "full consideration" of the comments of the Federal review agencies, EPA will prepare and transmit the Federal comment on a permit application to the State. If appropriate and/or useful, EPA may transmit copies of the other Federal agencies' comment to the State as part of the official Federal comment. Those agencies are, of course, also free to furnish information copies of their comments to the State at the same time they submit them to EPA.

Section 233.51: This section received many comments, which range from the view that Federal review has been waived far too much to one that Federal review has not been waived for enough categories of discharge. Other than the few categories never eligible for waiver, waivers will be developed on a State-by-State basis. Each State has unique resources that must be considered in developing categories or discharge eligible for waiver. These categories will be developed in consultation with the Federal review agencies and will be open to public comment. We anticipate that use of this waiver mechanism will reduce unnecessary paperwork and direct the Federal presence to where it is most needed and appropriate.

The proposed rule specified that general permits are not eligible for waiver of Federal review. The proposal intended that *draft* general permits are not eligible for waiver of review. This has been clarified in the final rule.

In response to comment, we have reinstated the provision that discharges into National and historical monuments

are not eligible for waiver of Federal review, in light of the special Federal interest in them.

We anticipate that existing Corps nationwide permits will be used as a basis for developing categories to discharge eligible for waiver of Federal review. Previous Federal agencies' comments (or no comment) can also be used in determining activities eligible for waiver of Federal review. Where EPA has used the advanced identification procedure with the Corps or the State under 40 CFR 230.80, or on its own initiative under Section 404(c) (40 CFR Part 231), the results of that process will be used to determine those areas and categories of discharge that should be, and/or those that should not be, considered for waiver of Federal review.

Categories of activities eligible for waiver of Federal review in a particular State will be developed after consultation with the Corps, FWS, and NMFS. These categories will be described in the State's submission for program approval and therefore will be subject to public comment. Activities for which Federal review is waived are also subject to annual review. If, at any time, any of these categories of activities are deemed inappropriate for continued waiver, they can (and will) be withdrawn from the waiver provision and become subject to individual review.

Section 233.52: In response to comments, we have added a requirement that the State's draft annual report to be made available for public inspection.

The annual report is a mandatory, not a discretionary, requirement for an approved program. In response to comment, we have added to the information that shall be included in the annual report the number of suspected unauthorized activities reported to the State and the nature of the State's action on these reported activities; added that the State shall report the number of violations identified as well as the number and nature of enforcement actions taken; and the number of permit applications received but not yet processed.

Contrary to comment on the annual reporting requirements, the regulation does require the Director to respond, in the final report, to the Regional Administrator's comments and questions about the draft report.

Section 233.53: One commentor suggested that program withdrawal should be initiated only where a State's program, on the whole, has repeatedly failed to comply with the requirements for an approvable program. This commentor suggested that continued problems with any one of the criteria specified in § 233.53(b) (2) and (3) is not sufficient grounds for program withdrawal. We cannot concur with this suggestion. While we do agree that program withdrawal will not be taken lightly and that program approval will not be withdrawn for minor reasons, continued non-performance of any of the criteria specified can be grounds for initiating program withdrawal. Each of the criteria listed is a vital part of an approved program and continued non-performance of any of these would result in a program that no longer fulfills the requirements for an approved program.

These regulations provide that the Administrator shall respond in writing to any petition to commence withdrawal proceedings. One commentor suggested that this exceeded the public involvement requirements. We believe that such written response is nonetheless good policy and publish the rule as proposed.

Executive Order 12291

Since these rules are revisions which provide regulatory relief by, for the most part, increasing flexibility in State program design and administration, we have determined that they are not a major rule requiring a Regulatory Impact Analysis under Executive Order 12291. This rule has been reviewed by the Office of Management and Budget in accordance with the requirements of Executive Order 12291.

Regulatory Flexibility Act

This final rule was reviewed under the Regulatory Flexibility Act of 1980, Pub. L. 96–354, which requires preparation of a regulatory flexibility analysis for any rule which is likely to have significant economic impact on a substantial number of small entities. Since this revision to 40 CFR Part 233 will reduce paperwork, reporting requirements and application information requirements, this final rule will be beneficial to small entities. Thus, no Regulatory Flexibility Analysis is needed.

Paperwork Reduction Act

The Office of Management and Budget (OMB) has approved the information collection requirements contained in this final rule under the provisions of the *Paperwork Reduction Act*, 44 U.S.C. 3501 *et seq.* and has assigned OMB control numbers:

2090–011.
2090–012.
2090–013.
2090–015.

List of Subjects in 40 CFR Parts 232 and 233

Administrative practice and procedure, Reporting and recordkeeping requirements, Confidential business information, Water pollution control, Indian lands, Intergovernmental relations, Water supply, Waterways, Navigation, Penalties, Wetlands.

Dated: May 27, 1988.

Lee M. Thomas,

Administrator, Environmental Protection Agency.

For the reasons set out in the preamble, 40 CFR Part 232 is amended as set forth below.

1. Part 232 is added to read as follows:

PART 232—404 PROGRAM DEFINITIONS; EXEMPT ACTIVITIES NOT REQUIRING 404 PERMITS

Sec.
232.1 Purpose and scope of this part.
232.2 Definitions.
232.3 Activities not requiring permits.

Authority: 33 U.S.C. 1344.

§ 232.1 Purpose and scope of this part.

Part 232 contains definitions applicable to the Section 404 program for discharges of dredged or fill material. These definitions apply to both the Federally operated program and State administered programs after program approval. This part also describes those activities which are exempted from regulation. Regulations prescribing the substantive environmental criteria for issuance of Section 404 permits appear at 40 CFR Part 230. Regulations establishing procedures to be followed by the EPA in denying or restricting a disposal site appear at 40 CFR Part 231. Regulations containing the procedures and policies used by the Corps in administering the 404 program appear at 33 CFR Parts 320–330. Regulations specifying the procedures EPA will follow, and the criteria EPA will apply in approving, monitoring, and withdrawing approval of Section 404 State programs appear at 40 CFR Part 233.

§ 232.2 Definitions.

(a) *Administrator* means the Administrator of the Environmental Protection Agency or an authorized representative.

(b) *Application* means a form for applying for a permit to discharge dredged or fill material into waters of the United States.

(c) *Approved program* means a State program which has been approved by the Regional Administrator under Part 233 of this chapter or which is deemed

approved under Section 404(h)(3), 33 U.S.C. 1344(h)(3).

(d) *Best management practices* (BMPs) means schedules of activities, prohibitions of practices, maintenance procedures, and other management practices to prevent or reduce the pollution of waters of the United States from discharges of dredged or fill material. BMPs include methods, measures, practices, or design and performance standards which facilitate compliance with the Section 404(b)(1) Guidelines (40 CFR Part 230), effluent limitations or prohibitions under Section 307(a), and applicable water quality standards.

(e) *Discharge of dredged material* means any addition of dredged material into waters of the United States. The term includes, without limitation, the addition of dredged material to a specified discharge site located in waters of the United States and the runoff or overflow from a contained land or water disposal site. Discharges of pollutants into waters of the United States resulting from the onshore subsequent processing of dredged material that is extracted for any commercial use (other than fill) are not included within this term and are subject to Section 402 of the Act even though the extraction and deposit of such material may require a permit from the Corps or the State Section 404 program. The term does not include *de minimus*, incidental soil movement occurring during normal dredging operations.

(f) *Discharge of fill material* means the addition of fill material into waters of the United States. The term generally includes, without limitation, the following activities: Placement of fill that is necessary to the construction of any structure; the building of any structure or impoundment requiring rock, sand, dirt, or other materials for its construction; site-development fills for recreational, industrial, commercial, residential, and other uses, causeways or road fills; dams and dikes; artificial islands; property protection and/or reclamation devices such as riprap, groins, seawalls, breakwaters, and revetments; beach nourishment; levees; fill for structures such as sewage treatment facilities, intake and outfall pipes associated with power plants and subaqueous utility lines; and artificial reefs.

(g) *Dredged material* means material that is excavated or dredged from waters of the United States.

(h) *Effluent* means dredged material or fill material, including return flow from confined sites.

(i) *Fill material* means any "pollutant" which replaces portions of the "waters of the United States" with dry land or which changes the bottom elevation of a water body for any purpose.

(j) *General permit* means a permit authorizing a category of discharges of dredged or fill material under the Act. General permits are permits for categories of discharge which are similar in nature, will cause only minimal adverse environmental effects when performed separately, and will have only minimal cumulative adverse effect on the environment.

(k) *Owner or operator* means the owner or operator of any activity subject to regulation under the 404 program.

(l) *Permit* means a written authorization issued by an approved State to implement the requirements of Part 233, or by the Corps under 33 CFR Parts 320–330. When used in these regulations, "permit" includes "general permit" as well as individual permit.

(m) *Person* means an individual, association, partnership, corporation, municipality, State or Federal agency, or an agent or employee thereof.

(n) *Regional Administrator* means the Regional Administrator of the appropriate Regional Office of the Environmental Protection Agency or the authorized representative of the Regional Administrator.

(o) *Secretary* means the Secretary of the Army acting through the Chief of Engineers.

(p) *State regulated waters* means those waters of the United States in which the Corps suspends the issuance of Section 404 permits upon approval of a State's Section 404 permit program by the Administrator under Section 404(h). The program cannot be transferred for those waters which are presently used, or are susceptible to use in their natural condition or by reasonable improvement as a means to transport interstate or foreign commerce shoreward to their ordinary high water mark, including all waters which are subject to the ebb and flow of the tide shoreward to the high tide line, including wetlands adjacent thereto. All other waters of the United States in a State with an approved program shall be under jurisdiction of the State program, and shall be identified in the program description as required by Part 233.

(q) *Waters of the United States* means:

(1) All waters which are currently used, were used in the past, or may be susceptible to us in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide.

(2) All interstate waters including interstate wetlands.

(3) All other waters, such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation, or destruction of which would or could affect interstate or foreign commerce including any such waters:

(i) Which are or could be used by interstate or foreign travelers for recreational or other purposes; or

(ii) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or

(iii) Which are used or could be used for industrial purposes by industries in interstate commerce.

(4) All impoundments of waters otherwise defined as waters of the United States under this definition;

(5) Tributaries of waters identified in paragraphs (g)(1)-(4) of this section;

(6) The territorial sea; and

(7) Wetlands adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (q)(1)–(6) of this section.

Waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of the Act (other than cooling ponds as defined in 40 CFR 123.11(m) which also meet the criteria of this definition) are not waters of the United States.

(r) *Wetlands* means those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas.

§ 232.3 Activities not requiring permits.

Except as specified in paragraphs (a) and (b) of this section, any discharge of dredged or fill material that may result from any of the activities described in paragraph (c) of this section is not prohibited by or otherwise subject to regulation under this Part.

(a) If any discharge of dredged or fill material resulting from the activities listed in paragraph (c) of this section contains any toxic polutant listed under Section 307 of the Act, such discharge shall be subject to any applicable toxic effluent standard or prohibition, and shall require a Section 404 permit.

(b) Any discharge of dredged or fill material into waters of the United States incidental to any of the activities identified in paragraph (c) of this section

must have a permit if it is part of an activity whose purpose is to convert an area of the waters of the United States into a use to which it was not previously subject, where the flow or circulation of waters of the United States may be impaired or the reach of such waters reduced. Where the proposed discharge will result in significant discernable alterations to flow or circulation, the presumption is that flow or circulation may be impaired by such alteration.

[Note.—For example, a permit will be required for the conversion of a cypress swamp to some other use or the conversion of a wetland from silvicultural to agricultural use when there is a discharge of dredged or fill material into waters of the United States in conjunction with constuction of dikes, drainage ditches or other works or structures used to effect such conversion. A conversion of Section 404 wetland to a non-wetland is a change in use of an area of waters of the U.S. A discharge which elevates the bottom of waters of the United States without converting it to dry land does not thereby reduce the reach of, but may alter the flow or circulation of, waters of the United States.]

(c) The following activities are exempt from Section 404 permit requirements, except as specified in paragraphs (a) and (b) of this section:

(1)(i) Normal farming, silviculture and ranching activities such as plowing, seeding, cultivating, minor drainage, and harvesting for the production of food, fiber, and forest products, or upland soil and water conservation practices, as defined in paragraph (d) of this section.

(ii)(A) To fall under this exemption, the activities specified in paragraph (c)(1) of this section must be part of an established (i.e., ongong) farming, silviculture, or ranching operation, and must be in accordance with definitions in paragraph (d) of this section. Activities on areas lying fallow as part of a conventional rotational cycle are part of an established operation.

(B) Activities which bring an area into farming, silviculture or ranching use are not part of an established operation. An operation ceases to be established when the area in which it was conducted has been converted to another use or has lain idle so long that modifications to the hydrological regime are necessary to resume operation. If an activity takes place outside the waters of the United States, or if it does not involve a discharge, it does not need a Section 404 permit whether or not it was part of an established farming, silviculture or ranching operation.

(2) Maintenance, including emergency reconstruction of recently damaged parts, of currently serviceable structures such as dikes, dams, levees, groins, riprap breakwaters, causeways, bridge abutments or approaches, and transportation structures. Maintenance does not include any modification that changes the character, scope, or size of the original fill design. Emergency reconstruction must occur within a reasonable period of time after damage occurs in order to qualify for this exemption.

(3) Construction or maintenance of farm or stock ponds or irrigation ditches or the maintenance (but not construction) of drainage ditches. Discharge associated with siphons, pumps, headgates, wingwalls, wiers, diversion structures, and such other facilities as are appurtenant and functionally related to irrigation ditches are included in this exemption.

(4) Construction of temporary sedimentation basins on a construction site which does not include placement of fill material into waters of the United States. The term "construction site" refers to any site involving the erection of buildings, roads, and other discrete structures and the installation of support facilities necessary for construction and utilization of such structures. The term also includes any other land areas which involve land-disturbing excavation activities, including quarrying or other mining activities, where an increase in the runoff of sediment is controlled through the use of temporary sedimentation basins.

(5) Any activity with respect to which a State has an approved program under Section 208(b)(4) of the Act which meets the requirements of Section 208(b)(4)(B) and (C).

(6) Construction or maintenance of farm roads, forest roads, or temporary roads for moving mining equipment, where such roads are constructed and maintained in accordance with best management practices (BMPs) to assure that flow and circulation patterns and chemical and biological characteristics of waters of the United States are not impaired, that the reach of the waters of the United States is not reduced, and that any adverse effect on the aquatic environment will be otherwise minimized. The BMPs which must be applied to satisfy this provision include the following baseline provisions:

(i) Permanent roads (for farming or forestry activities), temporary access roads (for mining, forestry, or farm purposes) and skid trails (for logging) in waters of the United States shall be held to the minimum feasible number, width, and total length consistent with the purpose of specific farming, silvicultural or mining operations, and local topographic and climatic conditions;

(ii) All roads, temporary or permanent, shall be located sufficiently far from streams or other water bodies (except for portions of such roads which must cross water bodies) to minimize discharges of dredged or fill material into waters of the United States;

(iii) The road fill shall be bridged, culverted, or otherwise designed to prevent the restriction of expected flood flows;

(iv) The fill shall be properly stabilized and maintained to prevent erosion during and following construction;

(v) Discharges of dredged or fill material into waters of the United States to construct a road fill shall be made in a manner that minimizes the encroachment of trucks, tractors, bulldozers, or other heavy equipment within the waters of the United States (including adjacent wetlands) that lie outside the lateral boundaries of the fill itself;

(vi) In designing, constructing, and maintaining roads, vegetative disturbance in the waters of the United States shall be kept to a minimum;

(vii) The design, construction and maintenance of the road crossing shall not disrupt the migration or other movement of those species of aquatic life inhabiting the water body;

(viii) Borrow material shall be taken from upland sources whenever feasible;

(ix) The discharge shall not take, or jeopardize the continued existence of, a threatened or endangered species as defined under the Endangered Species Act, or adversely modify or destroy the critical habitat of such species;

(x) Discharges into breeding and nesting areas for migratory waterfowl, spawning areas, and wetlands shall be avoided if practical alternatives exist;

(xi) The discharge shall not be located in the proximity of a public water supply intake;

(xii) The discharge shall not occur in areas of concentrated shellfish production;

(xiii) The discharge shall not occur in a component of the National Wild and Scenic River System;

(xiv) The discharge of material shall consist of suitable material free from toxic pollutants in toxic amounts; and

(xv) All temporary fills shall be removed in their entirety and the area restored to its original elevation.

(d) For purpose of paragraph (c)(1) of this section, cultivating, harvesting, minor drainage, plowing, and seeding are defined as follows:

(1) Cultivating means physical methods of soil treatment employed within established farming, ranching and silviculture lands on farm, ranch, or

forest crops to aid and improve their growth, quality, or yield.

(2) Harvesting means physical measures employed directly upon farm, forest, or ranch crops within established agricultural and silvicultural lands to bring about their removal from farm, forest, or ranch land, but does not include the construction of farm, forest, or ranch roads.

(3)(i) Minor drainage means:

(A) The discharge of dredged or fill material incidental to connecting upland drainage facilities to waters of the United States, adequate to effect the removal of excess soil moisture from upland croplands. Construction and maintenance of upland (dryland) facilities, such as ditching and tiling, incidental to the planting, cultivating, protecting, or harvesting of crops, involve no discharge of dredged or fill material into waters of the United States, and as such never require a Section 404 permit;

(B) The discharge of dredged or fill material for the purpose of installing ditching or other water control facilities incidental to planting, cultivating, protecting, or harvesting of rice, cranberries or other wetland crop species, where these activities and the discharge occur in waters of the United States which are in established use for such agricultural and silvicultural wetland crop production;

(C) The discharge of dredged or fill material for the purpose of manipulating the water levels of, or regulating the flow or distribution of water within, existing impoundments which have been constructed in accordance with applicable requirements of the Act, and which are in established use for the production or rice, cranberries, or other wetland crop species.

[Note.—The provisions of paragraphs (d)(3)(i) (B) and (C) of this section apply to areas that are in established use exclusively for wetland crop production as well as areas in established use for conventional wetland/non-wetland crop rotation (e.g., the rotations of rice and soybeans) where such rotation results in the cyclical or intermittent temporary dewatering of such areas.]

(D) The discharge of dredged or fill material incidental to the emergency removal of sandbars, gravel bars, or other similar blockages which are formed during flood flows or other events, where such blockages close or constrict previously existing drainageways and, if not promptly removed, would result in damage to or loss of existing crops or would impair or prevent the plowing, seeding, harvesting or cultivating of crops on land in established use for crop production. Such removal does not include enlarging or extending the dimensions of, or changing the bottom elevations of, the affected drainageway as it existed prior to the formation of the blockage. Removal must be accomplished within one year after such blockages are discovered in order to be eligible for exemption.

(ii) Minor drainage in waters of the United States is limited to drainage within areas that are part of an established farming or silviculture operation. It does not include drainage associated with the immediate or gradual conversion of a wetland to a non-wetland (e.g., wetland species to upland species not typically adequate to life in saturated soil conditions), or conversion from one wetland use to another (for example, silviculture to farming).

In addition, minor drainage does not include the construction of any canal, ditch, dike or other waterway or structure which drains or otherwise significantly modifies a stream, lake, swamp, bog or any other wetland or aquatic area constituting waters of the United States. Any discharge of dredged or fill material into the waters of the United States incidental to the construction of any such structure or waterway requires a permit.

(4) Plowing means all forms of primary tillage, including moldboard, chisel, or wide-blade plowing, discing, harrowing, and similar physical means used on farm, forest or ranch land for the breaking up, cutting, turning over, or stirring of soil to prepare it for the planting of crops. Plowing does not include the redistribution of soil, rock, sand, or other surficial materials in a manner which changes any area of the waters of the United States to dryland. For example, the redistribution of surface materials by blading, grading, or other means to fill in wetland areas is not plowing. Rock crushing activities which result in the loss of natural drainage characteristics, the reduction of water storage and recharge capabilities, or the overburden of natural water filtration capacities do not constitute plowing. Plowing, as described above, will never involve a discharge of dredged or fill material.

(5) Seeding means the sowing of seed and placement of seedlings to produce farm, ranch, or forest crops and includes the placement of soil beds for seeds or seedlings on established farm and forest lands.

(e) Federal projects which qualify under the criteria contained in Section 404(r) of the Act are exempt from Section 404 permit requirements, but may be subject to other State or Federal requirements.

2. Authority citation for Part 233 continues to read as follows:

Authority: 33 U.S.C. 1344.

3. Part 233 is amended by revising Subparts A, B, C, E, and F and by redesignating Subpart D as G and the section number is changed from "233.42" to "233.60" and by adding a new Subpart D to read as follows:

PART 233–404 STATE PROGRAM REGULATIONS

Subpart A—General

Subpart B—Program Approval

Subpart C—Permit Requirements

Subpart D—Program Operation

Subpart E—Compliance Evaluation and Enforcement

Subpart F—Federal Oversight

* * * * *

Subpart A—General

§ 233.1 Purpose and scope.

(a) This Part specifies the procedures EPA will follow, and the criteria EPA

will apply, in approving, reviewing, and withdrawing approval of State programs under Section 404 of the Act.

(b) Except as provided in § 232.3, the State program must regulate all discharges of dredged or fill material into State regulated waters. Partial State programs are not approvable under Section 404. A State's decision not to assume existing Corps general permits does not constitute a partial program. The discharges previously authorized by general permit will be regulated by State individual permits. However, in many cases States will lack authority to regulate activities on Indian lands. This lack of authority does not impair a State's ability to obtain full program approval in accordance with this Part, i.e., inability of a State to regulate activities on Indian lands does not constitute a partial program. The Secretary will administer the program on Indian lands if the State does not have authority to regulate activities on Indian lands.

(c) Nothing in this Part precludes a State from adopting or enforcing requirements which are more stringent or from operating a program with greater scope, than required under this Part. Where an approved State program has a greater scope than required by Federal law, the additional coverage is not part of the Federally approved program and is not subject to Federal oversight or enforcement.

Note.—State assumption of the Section 404 program is limited to certain waters, as provided in section 404(g)(1). The Federal program operated by the Corps of Engineers continues to apply to the remaining waters in the State even after program approval. However, this does not restrict States from regulating discharges of dredged or fill material into those waters over which the Secretary retains Section 404 jurisdiction.

(d) Any approved State Program shall, at all times, be conducted in accordance with the requirements of the Act and of this Part. While States may impose more stringent requirements, they may not impose any less stringent requirements for any purpose.

§ 233.2 Definitions.

The definitions in Parts 230 and 232 as well as the following definitions apply to this Part.

(a) *Act* means the Clean Water Act (33 U.S.C. 1251 et seq.).

(b) *Corps* means the U.S. Army Corps of Engineers.

(c) *FWS* means the U.S. Fish and Wildlife Service.

(d) *Interstate agency* means an agency of two or more States established by or under an agreement or compact approved by the Congress, or any other agency of two or more States having substantial powers or duties pertaining to the control of pollution.

(e) *NMFS* means the National Marine Fisheries Service.

(f) *State* means any of the 50 States, the District of Columbia, Guam, the Commonwealth of Puerto Rico, the Virgin Islands, American Samoa, the Commonwealth of the Northern Mariana Islands, and the Trust Territory of the Pacific Islands. For purposes of this regulation, the word State also includes any interstate agency requesting program approval or administering an approved program.

(g) *State Director* (*Director*) means the chief administrative officer of any State or interstate agency operating an approved program, or the delegated representative of the Director. If responsibility is divided among two or more State or interstate agencies, Director means the chief administrative officer of the State or interstate agency authorized to perform the particular procedure or function to which reference is made.

(h) *State 404 program* or *State program* means a State program which has been approved by EPA under Section 404 of the Act to regulate the discharge of dredged or fill material into certain waters as defined in § 232.2(p).

§ 233.3 Confidentiality of information.

(a) Any information submitted to EPA pursuant to these regulations may be claimed as confidential by the submitter at the time of submittal and a final determination as to that claim will be made in accordance with the procedures of 40 CFR Part 2 and paragraph (c) of this section.

(b) Any information submitted to the Director may be claimed as confidential in accordance with State law, subject to paragraphs (a) and (c) of this section.

(c) Claims of confidentiality for the following information will be denied:

(1) The name and address of any permit applicant or permittee,

(2) Effluent data,

(3) Permit application, and

(4) Issued permit.

§ 233.4 Conflict of interest.

Any public officer or employee who has a direct personal or pecuniary interest in any matter that is subject to decision by the agency shall make known such interest in the official records of the agency and shall refrain from participating in any manner in such decision.

Subpart B—Program Approval

§ 233.10 Elements of a program submission.

Any State that seeks to administer a 404 program under this Part shall submit to the Regional Administrator at least three copies of the following:

(a) A letter from the Governor of the State requesting program approval.

(b) A complete program description, as set forth in § 233.11.

(c) An Attorney General's statement, as set forth in § 233.12.

(d) A Memorandum of Agreement with the Regional Administrator, as set forth in § 233.13.

(e) A Memorandum of Agreement with the Secretary, as set forth in § 233.14.

(f) Copies of all applicable State statutes and regulations, including those governing applicable State administrative procedures.

§ 233.11 Program description.

The program description as required under § 233.10 shall include:

(a) A description of the scope and structure of the State's program. The description should include extent of State's jurisdiction, scope of activities regulated, anticipated coordination, scope of permit exemptions if any, and permit review criteria;

(b) A description of the State's permitting, administrative, judicial review, and other applicable procedures;

(c) A description of the basic organization and structure of the State agency (agencies) which will have responsibility for administering the program. If more than one State agency is responsible for the administration of the program, the description shall address the responsibilities of each agency and how the agencies intend to coordinate administration and evaluation of the program;

(d) A description of the funding and manpower which will be available for program administration;

(e) An estimate of the anticipated workload, e.g., number of discharges.

(f) Copies of permit application forms, permit forms, and reporting forms;

(g) A description of the State's compliance evaluation and enforcement programs, including a description of how the State will coordinate its enforcement strategy with that of the Corps and EPA;

(h) A description of the waters of the United States within a State over which the State assumes jurisdiction under the approved program; a description of the waters of the United States within a State over which the Secretary retains

jurisdiction subsequent to program approval; and a comparison of the State and Federal definitions of wetlands.

Note.—States should obtain from the Secretary an identification of those waters of the U.S. within the State over which the Corps retains authority under Section 404(g) of the Act.

(i) A description of the specific best management practices proposed to be used to satisfy the exemption provisions of Section 404(f)(1)(E) of the Act for construction or maintenance of farm roads, forest roads, or temporary roads for moving mining equipment.

§ 233.12 Attorney General's statement.

(a) Any State that seeks to administer a program under this Part shall submit a statement from the State Attorney General (or the attorney for those State or interstate agencies which have independence legal counsel), that the laws and regulations of the State, or an interstate compact, provide adequate authority to carry out the program and meet the applicable requirements of this Part. This statement shall cite specific statutes and administrative regulations which are lawfully adopted at the time the statement is signed and which shall be fully effective by the time the program is approved, and, where appropriate, judicial decisions which demonstrate adequate authority. The attorney signing the statement required by this section must have authority to represent the State agency in court on all matters pertaining to the State program.

(b) If a State seeks approval of a program covering activities on Indian lands, the statement shall contain an analysis of the State's authority over such activities.

(c) The State Attorney General's statement shall contain a legal analysis of the effect of State law regarding the prohibition on taking private property without just compensation on the successful implementation of the State's program.

(d) In those States where more than one agency has responsibility for administering the State program, the statement must include certification that each agency has full authority to administer the program within its category of jurisdiction and that the State, as a whole, has full authority to administer a complete State Section 404 program.

§ 233.13 Memorandum of Agreement with Regional Administrator.

(a) Any State that seeks to administer a program under this Part shall submit a Memorandum of Agreement executed by the Director and the Regional Administrator. The Memorandum of Agreement shall become effective upon approval of the State program. When more than one agency within a State has responsibility for administering the State program, Directors of each of the responsible State agencies shall be parties to the Memorandum of Agreement.

(b) The Memorandum of Agreement shall set out the State and Federal responsibilities for program administration and enforcement. These shall include, but not be limited to:

(1) Provisions specifying classes and categories of permit applications for which EPA will waive Federal review (as specified in § 233.51).

(2) Provisions specifying the frequency and content of reports, documents and other information which the State may be required to submit to EPA in addition to the annual report, as well as a provision establishing the submission date for the annual report. The State shall also allow EPA routinely to review State records, reports and files relevant to the administration and enforcement of the approved program.

(3) Provisions addressing EPA and State roles and coordination with respect to compliance monitoring and enforcement activities.

(4) Provisions addressing modification of the Memorandum of Agreement.

§ 233.14 Memorandum of Agreement with the Secretary.

(a) Before a State program is approved under this Part, the Director shall enter into a Memorandum of Agreement with the Secretary. When more than one agency within a State has responsibility for administering the State program, Directors of each of the responsible agencies shall be parties of the Memorandum of Agreement.

(b) The Memorandum of Agreement shall include:

(1) A description of waters of the United States within the State over which the Secretary retains jurisdiction, as identified by the Secretary.

(2) Procedures whereby the Secretary will, upon program approval, transfer to the State pending 404 permit applications for discharges in State regulated waters and other relevant information not already in the possession of the Director.

Note.—Where a State permit program includes coverage of those traditionally navigable waters in which only the Secretary may issue Section 404 permits, the State is encouraged to establish in this MOA procedures for joint processing of Federal and State permits, including joint public notices and public hearings.

(3) An identification of all general permits issued by the Secretary the terms and conditions of which the State intends to administer and enforce upon receiving approval of its program, and a plan for transferring responsibility for these general permits to the State, including procedures for the prompt transmission from the Secretary to the Director of relevant information not already in the possession of the Director, including support files for permit issuance, compliance reports and records of enforcement actions.

§ 233.15 Procedures for approving State programs.

(a) The 120 day statutory review period shall commence on the date of receipt of a complete State program submission as set out in § 233.10 of this Part. EPA shall determine whether the submission is complete within 30 days of receipt of the submission and shall notify the State of its determination. If EPA finds that a State's submission is incomplete, the statutory review period shall not begin until all the necessary information is received by EPA.

(b) If EPA determines the State significantly changes its submission during the review period, the statutory review period shall begin again upon the receipt of a revised submission.

(c) The State and EPA may extend the statutory review period by agreement.

(d) Within 10 days of receipt of a complete State Section 404 program submission, the Regional Administrator shall provide copies of the State's submission to the Corps, FWS, and NMFS (both Headquarters and appropriate Regional organizations.)

(e) After determining that a State program submission is complete, the Regional Administrator shall publish notice of the State's application in the Federal Register and in enough of the largest newspapers in the State to attract statewide attention. The Regional Administrator shall also mail notice to persons known to be interested in such matters. Existing State, EPA, Corps, FWS, and NMFS mailing lists shall be used as a basis for this mailing. However, failure to mail all such notices shall not be grounds for invalidating approval (or disapproval) of an otherwise acceptable (or unacceptable) program. This notice shall:

(1) Provide for a comment period of not less than 45 days during which interested members of the public may express their views on the State program.

(2) Provide for a public hearing within the State to be held not less than 30

days after notice of hearing is published in the **Federal Register**;

(3) Indicate where and when the State's submission may be reviewed by the public;

(4) Indicate whom an interested member of the public with questions should contact; and

(5) Briefly outline the fundamental aspects of the State's proposed program and the process for EPA review and decision.

(f) Within 90 days of EPA's receipt of a complete program submission, the Corps, FWS, and NMFS shall submit to EPA any comments on the State's program.

(g) Within 120 days of receipt of a complete program submission (unless an extension is agreed to by the State), the Regional Administrator shall approve or disapprove the program based on whether the State's program fulfills the requirements of this Part and the Act, taking into consideration all comments received. The Regional Administrator shall prepare a responsiveness summary of significant comments received and his response to these comments. The Regional Administrator shall respond individually to comments received from the Corps, FWS, and NMFS.

(h) If the Regional Administrator approves the State's Section 404 program, he shall notify the State and the Secretary of the decision and publish notice in the **Federal Register**. Transfer of the program to the State shall not be considered effective until such notice appears in the **Federal Register**. The Secretary shall suspend the issuance by the Corps of Section 404 permits in State regulated waters on such effective date.

(i) If the Regional Administrator disapproves the State's program based on the State not meeting the requirements of the Act and this Part, the Regional Administrator shall notify the State of the reasons for the disapproval and of any revisions or modifications to the State's program which are necessary to obtain approval. If the State resubmits a program submission remedying the identified problem areas, the approval procedure and statutory review period shall begin upon receipt of the revised submission.

§ 233.16 Procedures for revision of State programs.

(a) The State shall keep the Regional Administrator fully informed of any proposed or actual changes to the State's statutory or regulatory authority or any other modifications which are significant to administration of the program.

(b) Any approved program which requires revision because of a modification to this Part or to any other applicable Federal statute or regulation shall be revised within one year of the date of promulgation of such regulation, except that if a State must amend or enact a statute in order to make the required revision, the revision shall take place within two years.

(c) States with approved programs shall notify the Regional Administrator whenever they propose to transfer all or part of any program from the approved State agency to any other State agency. The new agency is not authorized to administer the program until approved by the Regional Administrator under paragraph (d) of this section.

(d) Approval of revision of a State program shall be accomplished as follows:

(1) The Director shall submit a modified program description or other documents which the Regional Administrator determines to be necessary to evaluate whether the program complies with the requirements of the Act and this Part.

(2) Notice of approval of program changes which are not substantial revisions may be given by letter from the Regional Administrator to the Governor or his designee.

(3) Whenever the Regional Administrator determines that the proposed revision is substantial, he shall publish and circulate notice to those persons known to be interested in such matters, provide opportunity for a public hearing, and consult with the Corps, FWS, and NMFS. The Regional Administrator shall approve or disapprove program revisions based on whether the program fulfills the requirements of the Act and this Part, and shall publish notice of his decision in the **Federal Register**. For purposes of this paragraph, substantial revisions include, but are not limited to, revisions that affect the area of jurisdiction, scope of activities regulated, criteria for review of permits, public participation, or enforcement capability.

(4) Substantial program changes shall become effective upon approval by the Regional Administrator and publication of notice in the **Federal Register**.

(e) Whenever the Regional Administrator has reason to believe that circumstances have changed with respect to a State's program, he may request and the State shall provide a supplemental Attorney General's statement, program description, or such other documents or information as are necessary to evaluate the program's compliance with the requirements of the Act and this Part.

Subpart C—Permit Requirements

§ 233.20 Prohibitions.

No permit shall be issued by the Director in the following circumstances:

(a) When permit does not comply with the requirements of the Act or regulations thereunder, including the Section 404(b)(1) Guidelines (Part 230 of this Chapter).

(b) When the Regional Administrator has objected to issuance of the permit under § 233.50 and the objection has not been resolved.

(c) When the proposed discharges would be in an area which has been prohibited, withdrawn, or denied as a disposal site by the Administrator under Section 404(c) of the Act, or when the discharge would fail to comply with a restriction imposed thereunder.

(d) If the Secretary determines, after consultation with the Secretary of the Department in which the Coast Guard is operating, that anchorage and navigation of any of the navigable waters would be substantially impaired.

§ 233.21 General permits.

(a) Under Section 404(h)(5) of the Act, States may, after program approval, administer and enforce general permits previously issued by the Secretary in State regulated waters.

Note: If States intend to assume existing general permits, they must be able to ensure compliance with existing permit conditions an any reporting monitoring, or prenotification requirements.

(b) The Director may issue a general permit for categories of similar activities if he determines that the regulated activities will cause only minimal adverse environmental effects when performed separately and will have only minimal cumulative adverse effects on the environment. Any general permit issued shall be in compliance with the Section 404(b)(1) Guidelines.

(c) In addition to the conditions specified in § 233.23, each general permit shall contain:

(1) A specific description of the type(s) of activities which are authorized, including limitations for any single operation. The description shall be detailed enough to ensure that the requirements of paragraph (b) of this section are met. (This paragraph supercedes § 233.23(c)(1) for general permits.)

(2) A precise description of the geographic area to which the general permit applies, including limitations on the type(s) of water where operations may be conducted sufficient to ensure that the requirements of paragraph (b) of this section are met.

(d) Predischarge notification or other reporting requirements may be required by the Director on a permit-by-permit basis as appropriate to ensure that the general permit will comply with the requirement (section 404(e) of the Act) that the regulated activities will cause only minimal adverse environmental effects when performed separately and will have only minimal cumulative adverse effects on the environment.

(e) The Director may, without revoking the general permit, require any person authorized under a general permit to apply for an individual permit. This discretionary authority will be based on concerns for the aquatic environment including compliance with paragraph (b) of this section and the 404(b)(1) Guidelines (40 CFR Part 230.)

(1) This provision in no way affects the legality of activities undertaken pursuant to the general permit prior to notification by the Director of such requirement.

(2) Once the Director notifies the discharger of his decision to exercise discretionary authority to require an individual permit, the discharger's activity is no longer authorized by the general permit.

§ 233.22 Emergency permits.

(a) Notwithstanding any other provision of this Part, the Director may issue a temporary emergency permit for a discharge of dredged or fill material if unacceptable harm to life or severe loss of physical property is likely to occur before a permit could be issued or modified under procedures normally required.

(b) Emergency permits shall incorporate, to the extent possible and not inconsistent with the emergency situation, all applicable requirements of § 233.23.

(1) Any emergency permit shall be limited to the duration of time (typically no more than 90 days) required to complete the authorized emergency action.

(2) The emergency permit shall have a condition requiring appropriate restoration of the site.

(c) The emergency permit may be terminated at any time without process (§ 233.36) if the Director determines that termination is necessary to protect human health or the environment.

(d) The Director shall consult in an expeditious manner, such as by telephone, with the Regional Administrator, the Corps, FWS, and NMFS about issuance of an emergency permit.

(e) The emergency permit may be oral or written. If oral, it must be followed within 5 days by a written emergency permit. A copy of the written permit shall be sent to the Regional Administrator.

(f) Notice of the emergency permit shall be published and public comments solicited in accordance with § 233.32 as soon as possible but no later than 10 days after the issuance date.

§ 233.23 Permit conditions.

(a) For each permit the Director shall establish conditions which assure compliance with all applicable statutory and regulatory requirements, including the 404(b)(1) Guidelines, applicable Section 303 water quality standards, and applicable Section 307 effluent standards and prohibitions.

(b) Section 404 permits shall be effective for a fixed term not to exceed 5 years.

(c) Each 404 permit shall include conditions meeting or implementing the following requirements:

(1) A specific identification and complete description of the authorized activity including name and address of permittee, location and purpose of discharge, type and quantity of material to be discharged. (This subsection is not applicable to general permits).

(2) Only the activities specifically described in the permit are authorized.

(3) The permittee shall comply with all conditions of the permit even if that requires halting or reducing the permitted activity to maintain compliance. Any permit violation constitutes a violation of the Act as well as of State statute and/or regulation.

(4) The permittee shall take all reasonable steps to minimize or prevent any discharge in violation of this permit.

(5) The permittee shall inform the Director of any expected or known actual noncompliance.

(6) The permittee shall provide such information to the Director, as the Director requests, to determine compliance status, or whether cause exists for permit modification, revocation or termination.

(7) Monitoring, reporting and recordkeeping requirements as needed to safeguard the aquatic environment. (Such requirements will be determined on a case-by-case basis, but at a minimum shall include monitoring and reporting of any expected leachates, reporting of noncompliance, planned changes or transfer of the permit.)

(8) Inspection and entry. The permittee shall allow the Director, or his authorized representative, upon presentation of proper identification, at reasonable times to:

(i) Enter upon the permittee's premises where a regulated activity is located or where records must be kept under the conditions of the permit,

(ii) Have access to and copy any records that must be kept under the conditions of the permit,

(iii) Inspect operations regulated or required under the permit, and

(iv) Sample or monitor, for the purposes of assuring permit compliance or as otherwise authorized by the Act, any substances or parameters at any location.

(9) Conditions assuring that the discharge will be conducted in a manner which minimizes adverse impacts upon the physical, chemical and biological integrity of the waters of the United States, such as requirements for restoration or mitigation.

Subpart D—Program Operation

§ 233.30 Application for a permit.

(a) Except when an activity is authorized by a general permit issued pursuant to § 233.21 or is exempt from the requirements to obtain a permit under § 232.3, any person who proposes to discharge dredged or fill material into State regulated waters shall complete, sign and submit a permit application to the Director. Persons proposing to discharge dredged or fill material under the authorization of a general permit must comply with any reporting requirements of the general permit.

(b) A complete application shall include:

(1) Name, address, telephone number of the applicant and name(s) and address(es) of adjoining property owners.

(2) A complete description of the proposed activity including necessary drawings, sketches or plans sufficient for public notice (the applicant is not generally expected to submit detailed engineering plans and specifications); the location, purpose and intended use of the proposed activity; scheduling of the activity; the location and dimensions of adjacent structures; and a list of authorizations required by other Federal, interstate, State or local agencies for the work, including all approvals received or denials already made.

(3) The application must include a description of the type, composition, source and quantity of the material to be discharged, the method of discharge, and the site and plans for disposal of the dredged or fill material.

(4) A certification that all information contained in the application is true and accurate and acknowledging awareness of penalties for submitting false information.

(5) All activities which the applicant plans to undertake which are reasonably related to the same project should be included in the same permit application.

(c) In addition to the information indicated in § 233.30(b), the applicant will be required to furnish such additional information as the Director deems appropriate to assist in the evaluation of the application. Such additional information may include environmental data and information on alternate methods and sites as may be necessary for the preparation of the required environmental documentation.

(d) The level of detail shall be reasonably commensurate with the type and size of discharge, proximity to critical areas, likelihood of long-lived toxic chemical substances, and potential level of environmental degradation.

Note: EPA encourages States to provide permit applicants guidance regarding the level of detail of information and documentation required under this subsection. This guidance can be provided either through the application form or on an individual basis. EPA also encourages the State to maintain a program to inform potential applicants for permits of the requirements of the State program and of the steps required to obtain permits for activities in State regulated waters.

§ 233.31 Coordination requirements.

(a) If a proposed discharge may affect the biological, chemical, or physical integrity of the waters of any State(s) other than the State in which the discharge occurs, the Director shall provide an opportunity for such State(s) to submit written comments within the public comment period and to suggest permit conditions. If these recommendations are not accepted by the Director, he shall notify the affected State and the Regional Administrator prior to permit issuance in writing of his failure to accept these recommendations, together with his reasons for so doing. The Regional Administrator shall then have the time provided for in § 233.50(d) to comment upon, object to, or make recommendations.

(b) State Section 404 permits shall be coordinated with Federal and Federal-State water related planning and review processes.

§ 233.32 Public notice.

(a) Applicability.

(1) The Director shall give public notice of the following actions:

(i) Receipt of a permit application.

(ii) Preparation of a draft general permit.

(iii) Consideration of a major modification to an issued permit.

(iv) Scheduling of a public hearing.

(v) Issuance of an emergency permit.

(2) Public notices may describe more than one permit or action.

(b) Timing.

(1) The public notice shall provide a reasonable period of time, normally at least 30 days, within which interested parties may express their views concerning the permit application.

(2) Public notice of a public hearing shall be given at least 30 days before the hearing.

(3) The Regional Administrator may approve a program with shorter public notice timing if the Regional Administrator determines that sufficient public notice is provided for.

(c) The Director shall give public notice by each of the following methods:

(1) By mailing a copy of the notice to the following persons (any person otherwise entitled to receive notice under this paragraph may waive his rights to receive notice for any classes or categories of permits):

(i) The applicant.

(ii) Any agency with jurisdiction over the activity or the disposal site, whether or not the agency issues a permit.

(iii) Owners of property adjoining the property where the regulated activity will occur.

(iv) All persons who have specifically requested copies of public notices. (The Director may update the mailing list from time to time by requesting written indication of continued interest from those listed. The Director may delete from the list the name of any person who fails to respond to such a request.)

(v) Any State whose waters may be affected by the proposed discharge.

(2) In addition, by providing notice in at least one other way (such as advertisement in a newspaper of sufficient circulation) reasonably calculated to cover the area affected by the activity.

(d) All public notices shall contain at least the following information:

(1) The name and address of the applicant and, if different, the address or location of the activity(ies) regulated by the permit.

(2) The name, address, and telephone number of a person to contact for further information.

(3) A brief description of the comment procedures and procedures to request a public hearing, including deadlines.

(4) A brief description of the proposed activity, its purpose and intended use, so as to provide sufficient information concerning the nature of the activity to generate meaningful comments, including a description of the type of structures, if any, to be erected on fills, and a description of the type, composition and quantity of materials to be discharged.

(5) A plan and elevation drawing showing the general and specific site location and character of all proposed activities, including the size relationship of the proposed structures to the size of the impacted waterway and depth of water in the area.

(6) A paragraph describing the various evaluation factors, including the 404(b)(1) Guidelines or State-equivalent criteria, on which decisions are based.

(7) Any other information which would significantly assist interested parties in evaluating the likely impact of the proposed activity.

(e) Notice of public hearing shall also contain the following information:

(1) Time, date, and place of hearing.

(2) Reference to the date of any previous public notices relating to the permit.

(3) Brief description of the nature and purpose of the hearing.

§ 233.33 Public hearing.

(a) Any interested person may request a public hearing during the public comment period as specified in § 233.32. Requests shall be in writing and shall state the nature of the issues proposed to be raised at the hearing.

(b) The Director shall hold a public hearing whenever he determines there is a significant degree of public interest in a permit application or a draft general permit. He may also hold a hearing, at his discretion, whenever he determines a hearing may be useful to a decision on the permit application.

(c) At a hearing, any person may submit oral or written statements or data concerning the permit application or draft general permit. The public comment period shall automatically be extended to the close of any public hearing under this section. The presiding officer may also extend the comment period at the hearing.

(d) All public hearings shall be reported verbatim. Copies of the record of proceedings may be purchased by any person from the Director or the reporter of such hearing. A copy of the transcript (or if none is prepared, a tape of the proceedings) shall be made available for public inspection at an appropriate State office.

§ 233.34 Making a decision on the permit application.

(a) The Director will review all applications for compliance with the 404(b)(1) Guidelines and/or equivalent State environmental criteria as well as any other applicable State laws or regulations.

(b) The Director shall consider all comments received in response to the public notice, and public hearing if a hearing is held. All comments, as well as the record of any public hearing, shall be made part of the official record on the application.

(c) After the Director has completed his review of the application and consideration of comments, the Director will determine, in accordance with the record and all applicable regulations, whether or not the permit should be issued. No permit shall be issued by the Director under the circumstances described in § 233.20. The Director shall prepare a written determination on each application outlining his decision and rationale for his decision. The determination shall be dated, signed and included in the official record prior to final action on the application. The official record shall be open to the public.

§ 233.35 Issuance and effective date of permit.

(a) If the Regional Administrator comments on a permit application or draft general permit under § 233.50, the Director shall follow the procedures specified in that section in issuing the permit.

(b) If the Regional Administrator does not comment on a permit application or draft general permit, the Director shall make a final permit decision after the close of the public comment period and shall notify the applicant.

(1) If the decision is to issue a permit, the permit becomes effective when it is signed by the Director and the applicant.

(2) If the decision is to deny the permit, the Director will notify the applicant in writing of the reason(s) for denial.

§ 233.36 Modification, suspension or revocation of permits.

(a) *General.* The Director may reevaluate the circumstances and conditions of a permit either on his own motion or at the request of the permittee or of a third party and initiate action to modify, suspend, or revoke a permit if he determines that sufficient cause exists. Among the factors to be considered are:

(1) Permittee's noncompliance with any of the terms or conditions of the permit;

(2) Permittee's failure in the application or during the permit issuance process to disclose fully all relevant facts or the permittee's misrepresentation of any relevant facts at the time;

(3) Information that activities authorized by a general permit are having more than minimal individual or cumulative adverse effect on the environment, or that the permitted activities are more appropriately regulated by individual permits;

(4) Circumstances relating to the authorized activity have changed since the permit was issued and justify changed permit conditions or temporary or permanent cessation of any discharge controlled by the permit;

(5) Any significant information relating to the activity authorized by the permit if such information was not available at the time the permit was issued and would have justified the imposition of different permit conditions or denial at the time of issuance;

(6) Revisions to applicable statutory or regulatory authority, including toxic effluent standards or prohibitions or water quality standards.

(b) *Limitations.* Permit modifications shall be in compliance with § 233.20.

(c) *Procedures.* (1) The Director shall develop procedures to modify, suspend or revoke permits if he determines cause exists for such action (§ 233.36(a)). Such procedures shall provide opportunity for public comment (§ 233.32), coordination with the Federal review agencies (§ 233.50), and opportunity for public hearing (§ 233.33) following notification of the permittee. When permit modification is proposed, only the conditions subject to modification need be reopened.

(2) Minor modification of permits. The Director may, upon the consent of the permittee, use abbreviated procedures to modify a permit to make the following corrections or allowance for changes in the permitted activity:

(i) Correct typographical errors;

(ii) Require more frequent monitoring or reporting by permittee;

(iii) Allow for a change in ownership or operational control of a project or activity where the Director determines that no other change in the permit is necessary, provided that a written agreement containing a specific date for transfer of permit responsibility, coverage, and liability between the current and new permittees has been submitted to the Director;

(iv) Provide for minor modification of project plans that do not significantly change the character, scope, and/or purpose of the project or result in significant change in environmental impact;

(v) Extend the term of a permit, so long as the modification does not extend the term of the permit beyond 5 years from its original effective date and does not result in any increase in the amount of dredged or fill material allowed to be discharged.

§ 233.37 Signatures on permit applications and reports.

The application and any required reports must be signed by the person who desires to undertake the proposed activity or by that person's duly authorized agent if accompanied by a statement by that person designating the agent. In either case, the signature of the applicant or the agent will be understood to be an affirmation that he possesses or represents the person who possesses the requisite property interest to undertake the activity proposed in the application.

§ 233.38 Continuation of expiring permits.

A Corps 404 permit does not continue in force beyond its expiration date under Federal law if, at that time, a State is the permitting authority. States authorized to administer the 404 Program may continue Corps or State-issued permits until the effective date of the new permits, if State law allows. Otherwise, the discharge is being conducted without a permit from the time of expiration of the old permit to the effective date of a new State-issued permit, if any.

Subpart E—Compliance Evaluation and Enforcement

§ 233.40 Requirements for compliance evaluation programs.

(a) In order to abate violations of the permit program, the State shall maintain a program designed to identify persons subject to regulation who have failed to obtain a permit or to comply with permit conditions.

(b) The Director and State officers engaged in compliance evaluation, upon presentation of proper identification, shall have authority to enter any site or premises subject to regulation or in which records relevant to program operation are kept in order to copy any records, inspect, monitor or otherwise investigate compliance with the State program.

(c) The State program shall provide for inspections to be conducted, samples to be taken and other information to be gathered in a manner that will produce evidence admissible in an enforcement proceeding.

(d) The State shall maintain a program for receiving and ensuring proper consideration of information submitted by the public about violations.

§ 233.41 Requirements for enforcement authority.

(a) Any State agency administering a program shall have authority:

(1) To restrain immediately and effectively any person from engaging in any unauthorized activity;

(2) To sue to enjoin any threatened or continuing violation of any program requirement;

(3) To assess or sue to recover civil penalties and to seek criminal remedies, as follows:

(i) The agency shall have the authority to assess or recover civil penalties for discharges of dredged or fill material without a required permit or in violation of any Section 404 permit condition in an amount of at least $5,000 per day of such violation.

(ii) The agency shall have the authority to seek criminal fines against any person who willfully or with criminal negligence discharges dredged or fill material without a required permit or violates any permit condition issued under Section 404 in the amount of at least $10,000 per day of such violation.

(iii) The agency shall have the authority to seek criminal fines against any person who knowingly makes false statements, representation, or certification in any application, record, report, plan, or other document filed or required to be maintained under the Act, these regulations or the approved State program, or who falsifies, tampers with, or knowingly renders inaccurate any monitoring device or method required to be maintained under the permit, in an amount of at least $5,000 for each instance of violation.

(b)(1) The approved maximum civil penalty or criminal fine shall be assessable for each violation and, if the violation is continuous, shall be assessable in that maximum amount for each day of violation.

(2) The burden of proof and degree of knowledge or intent required under State law for establishing violations under paragraph (a)(3) of this section, shall be no greater than the burden of proof or degree of knowledge or intent EPA must bear when it brings an action under the Act.

(c) The civil penalty assessed, sought, or agreed upon by the Director under paragraph (a)(3) of this section shall be appropriate to the violation.

Note.—To the extent that State judgments or settlements provide penalties in amounts which EPA believes to be substantially inadequate in comparison to the amounts which EPA would require under similar facts, EPA may, when authorized by Section 309 of the Act, commence separate action for penalties.

(d)(1) The Regional Administrator may approve a State program where the State lacks authority to recover penalties of the levels required under paragraphs (a)(3)(i)–(iii) of this section only if the Regional Administrator determines, after evaluating a record of at least one year for an alternative enforcement program, that the State has an alternate, demonstrably effective method of ensuring compliance which has both punitive and deterrence effects.

(2) States whose programs were approved via waiver of monetary penalties shall keep the Regional Administrator informed of all enforcement actions taken under any alternative method approved pursuant to paragraph (d)(1) of this section. The manner of reporting will be established in the Memorandum of Agreement with the Regional Administrator (§ 233.13).

(e) Any State administering a program shall provide for public participation in the State enforcement process by providing either:

(1) Authority which allows intervention of right in any civil or administrative action to obtain remedies specified in paragraph (a)(3) of this section by any citizen having an interest which is or may be adversely affected, or

(2) Assurance that the State agency or enforcement authority will:

(i) Investigate and provide written responses to all citizen complaints submitted pursuant to State procedures;

(ii) Not oppose intervention by any citizen when permissive intervention may be authorized by statute, rule, or regulation; and

(iii) Publish notice of and provide at least 30 days for public comment on any proposed settlement of a State enforcement action.

Subpart F—Federal Oversight

§ 233.50 Review of and objection to State permits.

(a) The Director shall promptly transmit to the Regional Administrator:

(1) A copy of the public notice for any complete permit applications received by the Director, except those for which permit review has been waived under § 233.51. The State shall supply the Regional Administrator with copies of public notices for permit applications for which permit review has been waived whenever requested by EPA.

(2) A copy of a draft general permit whenever the State intends to issue a general permit.

(3) Notice of every significant action taken by the State agency related to the consideration of any permit application except those for which Federal review has been waived or draft general permit.

(4) A copy of every issued permit.

(5) A copy of the Director's response to another State's comments/recommendations, if the Director does not accept these recommendations (§ 233.32(a)).

(b) Unless review has been waived under § 233.51, the Regional Administrator shall provide a copy of each public notice, each draft general permit, and other information needed for review of the application to the Corps, FWS, and NMFS, within 10 days of receipt. These agencies shall notify the Regional Administrator within 45 days of their receipt if they wish to comment on the public notice or draft general permit. Such agencies should submit their evaluation and comments to the Regional Administrator within 50 days of such receipt. The final decision to comment, object or to require permit conditions shall be made by the Regional Administrator. (These times may be shortened by mutual agreement of the affected Federal agencies and the State.)

(c) If the information provided is inadequate to determine whether the permit application or draft general permit meets the requirements of the Act, these regulations, and the 404(b)(1) Guidelines, the Regional Administrator may, within 30 days of receipt, request the Director to transmit to the Regional Administrator the complete record of the permit proceedings before the State, or any portions of the record, or other information, including a supplemental application, that the Regional Administrator determines necessary for review.

(d) If the Regional Administrator intends to comment upon, object to, or make recommendations with respect to a permit application, draft general permit, or the Director's failure to accept the recommendations of an affected State submitted pursuant to § 233.31(a), he shall notify the Director of his intent within 30 days of receipt. If the Director has been so notified, the permit shall not be issued until after the receipt of such comments or 90 days of the Regional Administrator's receipt of the public notice, draft general permit or Director's response (§ 233.31(a)), whichever comes first. The Regional Administrator may notify the Director within 30 days of receipt that there is no comment but that he reserves the right to object within 90 days of receipt, based on any new information brought out by the public during the comment period or at a hearing.

(e) If the Regional Administrator has given notice to the Director under paragraph (d) of this section, he shall submit to the Director, within 90 days of receipt of the public notice, draft general permit, or Director's response (§ 233.31(a)), a written statement of his

comments, objections, or recommendations; the reasons for the comments, objections, or recommendations; and the actions that must be taken by the Director in order to eliminate any objections. Any such objection shall be based on the Regional Administrator's determination that the proposed permit is (1) the subject of an interstate dispute under § 233.31(a) and/or (2) outside requirements of the Act, these regulations, or the 404(b)(1) Guidelines. The Regional Administrator shall make available upon request a copy of any comment, objection, or recommendation on a permit application or draft general permit to the permit applicant or to the public.

(f) When the Director has received an EPA objection or requirement for a permit condition to a permit application or draft general permit under this section, he shall not issue the permit unless he has taken the steps required by the Regional Administrator to eliminate the objection.

(g) Within 90 days of receipt by the Director of an objection or requirement for a permit condition by the Regional Administrator, the State or any interested person may request that the Regional Administrator hold a public hearing on the objection or requirement.

The Regional Administrator shall conduct a public hearing whenever requested by the State proposing to issue the permit, or if warranted by significant public interest based on requests received.

(h) If a public hearing is held under paragraph (g) of this section, the Regional Administrator shall, following that hearing, reaffirm, modify or withdraw the objection or requirement for a permit condition, and notify the Director of this decision.

(1) If the Regional Administrator withdraws his objection or requirement for a permit condition, the Director may issue the permit.

(2) If the Regional Administrator does not withdraw the objection or requirement for a permit condition, the Director must issue a permit revised to satisfy the Regional Administrator's objection or requirement for a permit condition or notify EPA of its intent to deny the permit within 30 days of receipt of the Regional Administrator's notification.

(i) If no public hearing is held under paragraph (g) of this section, the Director within 90 days of receipt of the objection or requirement for a permit condition shall either issue the permit revised to satisfy EPA's objections or notify EPA of its intent to deny the permit.

(j) In the event that the Director neither satisfies EPA's objections or requirement for a permit condition nor denies the permit, the Secretary shall process the permit application.

§ 233.51 Waiver of review.

(a) The MOA with the Regional Administrator shall specify the categories of discharge for which EPA will waive Federal review of State permit applications. After program approval, the MOA may be modified to reflect any additions or deletions of categories of discharge for which EPA will waive review. The Regional Administrator shall consult with the Corps, FWS, and NMFS prior to specifying or modifying such categories.

(b) With the following exceptions, any category of discharge is eligible for consideration for waiver:

(1) Draft general permits;

(2) Discharges with reasonable potential for affecting endangered or threatened species as determined by FWS;

(3) Discharges with reasonable potential for adverse impacts on waters of another State;

(4) Discharges known or suspected to contain toxic pollutants in toxic amounts (Section 101(a)(3) of the Act) or hazardous substances in reportable quantities (Section 311 of the Act);

(5) Discharges located in proximity of a public water supply intake;

(6) Discharges within critical areas established under State or Federal law, including but not limited to National and State parks, fish and wildlife sanctuaries and refuges, National and historical monuments, wilderness areas and preserves, sites identified or proposed under the National Historic Preservation Act, and components of the National Wild and Scenic Rivers System.

(c) The Regional Administrator retains the right to terminate a waiver as to future permit actions at any time by sending the Director written notice of termination.

§ 233.52 Program reporting

(a) The starting date for the annual period to be covered by reports shall be established in the Memorandum of Agreement with the Regional Administrator (§ 233.13.)

(b) The Director shall submit to the Regional Administrator within 90 days after completion of the annual period, a draft annual report evaluating the State's administration of its program identifying problems the State has encountered in the administration of its program and recommendations for resolving these problems. Items that shall be addressed in the annual report include an assessment of the cumulative impacts of the State's permit program on the integrity of the State regulated waters; identification of areas of particular concern and/or interest within the State; the number and nature of individual and general permits issued, modified, and denied; number of violations identified and number and nature of enforcement actions taken; number of suspected unauthorized activities reported and nature of action taken; an estimate of extent of activities regulated by general permits; and the number of permit applications received but not yet processed.

(c) The State shall make the draft annual report available for public inspection.

(d) Within 60 days of receipt of the draft annual report, the Regional Administrator will complete review of the draft report and transmit comments, questions, and/or requests for additional evaluation and/or information to the Director.

(e) Within 30 days of receipt of the Regional Administrator's comments, the Director will finalize the annual report, incorporating and/or responding to the Regional Administrator's comments, and transmit the final report to the Regional Administrator.

(f) Upon acceptance of the annual report, the Regional Administrator shall publish notice of availability of the final annual report.

§ 233.53 Withdrawal of program approval.

(a) A State with a program approved under this Part may voluntarily transfer program responsibilities required by Federal law to the Secretary by taking the following actions, or in such other manner as may be agreed upon with the Administrator.

(1) The State shall give the Administrator and the Secretary 180 days notice of the proposed transfer. The State shall also submit a plan for the orderly transfer of all relevant program information not in the possession of the Secretary (such as permits, permit files, reports, permit applications) which are necessary for the Secretary to administer the program.

(2) Within 60 days of receiving the notice and transfer plan, the Administrator and the Secretary shall evaluate the State's transfer plan and shall identify for the State any additional information needed by the Federal government for program administration.

(3) At least 30 days before the transfer is to occur the Administrator shall publish notice of transfer in the Federal

Register and in a sufficient number of the largest newspapers in the State to provide statewide coverage, and shall mail notice to all permit holders, permit applicants, other regulated persons and other interested persons on appropriate EPA, Corps and State mailing lists.

(b) The Administrator may withdraw program approval when a State program no longer complies with the requirements of this Part, and the State fails to take corrective action. Such circumstances include the following:

(1) When the State's legal authority no longer meets the requirements of this Part, including:

(i) Failure of the State to promulgate or enact new authorities when necessary; or

(ii) Action by a State legislature or court striking down or limiting State authorities.

(2) When the operation of the State program fails to comply with the requirements of this Part, including:

(i) Failure to exercise control over activities required to be regulated under this Part, including failure to issue permits;

(ii) Issuance of permits which do not conform to the requirements of this Part; or

(iii) Failure to comply with the public participation requirements of this Part.

(3) When the State's enforcement program fails to comply with the requirements of this Part, including:

(i) Failure to act on violations of permits or other program requirements;

(ii) Failure to seek adequate enforcement penalties or to collect administrative fines when imposed, or to implement alternative enforcement methods approved by the Administrator; or

(iii) Failure to inspect and monitor activities subject to regulation.

(4) When the State program fails to comply with the terms of the Memorandum of Agreement required under § 233.13.

(c) The following procedures apply when the Administrator orders the commencement of proceedings to determine whether to withdraw approval of a State program:

(1) *Order.* The Administrator may order the commencement of withdrawal proceedings on the Administrator's initiative or in response to a petition from an interested person alleging failure of the State to comply with the requirements of this Part as set forth in subsection (b) of this section. The Administrator shall respond in writing to any petition to commence withdrawal proceedings. He may conduct an informal review of the allegations in the petition to determine whether cause exists to commence proceedings under this paragraph. The Administrator's order commencing proceedings under this paragraph shall fix a time and place for the commencement of the hearing, shall specify the allegations against the State which are to be considered at the hearing, and shall be published in the **Federal Register**. Within 30 days after publication of the Administrator's order in the **Federal Register**, the State shall admit or deny these allegations in a written answer.

The party seeking withdrawal of the State's program shall have the burden of coming forward with the evidence in a hearing under this paragraph.

(2) *Definitions.* For purposes of this paragraph the definition of "Administrative Law Judge," "Hearing Clerk," and "Presiding Officer" in 40 CFR 22.03 apply in addition to the following:

(i) "Party" means the petitioner, the State, the Agency, and any other person whose request to participate as a party is granted.

(ii) "Person" means the Agency, the State and any individual or organization having an interest in the subject matter of the proceedings.

(iii) "Petitioner" means any person whose petition for commencement of withdrawal proceedings has been granted by the Administrator.

(3) *Procedures.*

(i) The following provisions of 40 CFR Part 22 [Consolidated Rules of Practice] are applicable to proceedings under this paragraph:

(A) Section 22.02—(use of number/gender);

(B) Section 22.04—(authorities of Presiding Officer);

(C) Section 22.06—(filing/service of rulings and orders);

(D) Section 22.09—(examination of filed documents);

(E) Section 22.19 (a), (b) and (c)—(prehearing conference);

(F) Section 22.22—(evidence);

(G) Section 22.23—(objections/offers of proof);

(H) Section 22.25—(filing the transcript; and

(I) Section 22.26—(findings/conclusions).

(ii) The following provisions are also applicable:

(A) Computation and extension of time.

(*1*) *Computation.* In computing any period of time prescribed or allowed in these rules of practice, except as otherwise provided, the day of the event from which the designated period begins to run shall not be included. Saturdays, Sundays, and Federal legal holidays shall be included. When a stated time expires on a Saturday, Sunday or Federal legal holiday, the stated time period shall be extended to include the next business day.

(*2*) *Extensions of time.* The Administrator, Regional Administrator, or Presiding Officer, as appropriate, may grant an extension of time for the filing of any pleading, document, or motion (*i*) upon timely motion of a party to the proceeding, for good cause shown and after consideration of prejudice to other parties, or (*ii*) upon his own motion. Such a motion by a party may only be made after notice to all other parties, unless the movant can show good cause why serving notice is impracticable. The motion shall be filed in advance of the date on which the pleading, document or motion is due to be filed, unless the failure of a party to make timely motion for extension of time was the result of excusable neglect.

(*3*) The time for commencement of the hearing shall not be extended beyond the date set in the Administrator's order without approval of the Administrator.

(B) Ex parte discussion of proceeding. At no time after the issuance of the order commencing proceedings shall the Administrator, Regional Administrator, Judicial Officer, Regional Judicial Officer, Presiding Officer, or any other person who is likely to advise these officials in the decisions on the case, discuss ex parte the merits of the proceeding with any interested person outside the Agency, with any Agency staff member who performs a prosecutorial or investigative function in such proceeding or a factually related proceeding, or with any representative of such person. Any ex parte memorandum or other communication addressed to the Administrator, Regional Administrator, Judicial Officer, Regional Judicial Officer, or the Presiding Officer during the pendency of the proceeding and relating to the merits thereof, by or on behalf of any party shall be regarded as argument made in the proceeding and shall be served upon all other parties. The other parties shall be given an opportunity to reply to such memorandum or communication.

(C) Intervention.

(*1*) *Motion.* A motion for leave to intervene in any proceeding conducted under these rules of practice must set forth the grounds for the proposed intervention, the position and interest of the movant and the likely impact that intervention will have on the expeditious progress of the proceeding. Any person already a party to the proceeding may file an answer to a motion to intervene, making specific reference to the factors set forth in the

foregoing sentence and paragraph (b)(3)(ii)(C)(*3*) of this section, within ten (10) days after service of the motion for leave to intervene.

(*2*) However, motions to intervene must be filed within 15 days from the date the notice of the Administrator's order is published in the **Federal Register.**

(*3*) *Disposition.* Leave to intervene may be granted only if the movant demonstrates that (*i*) his presence in the proceeding would not unduly prolong or otherwise prejudice the adjudication of the rights of the original parties; (*ii*) the movant will be adversely affected by a final order; and (*iii*) the interests of the movant are not being adequately represented by the original parties. The intervenor shall become a full party to the proceeding upon the granting of leave to intervene.

(*4*) *Amicus curiae.* Persons not parties to the proceeding who wish to file briefs may so move. The motion shall identify the interest of the applicant and shall state the reasons why the proposed amicus brief is desirable. If the motion is granted, the Presiding Officer or Administrator shall issue an order setting the time for filing such brief. An amicus curiae is eligible to participate in any briefing after his motion is granted, and shall be served with all briefs, reply briefs, motions, and orders relating to issues to be briefed.

(D) Motions. (1) *General.* All motions, except those made orally on the record during a hearing, shall (*i*) be in writing; (*ii*) state the grounds therefore with particularity; (*iii*) set forth the relief or order sought; and (*iv*) be accompanied by any affidavit, certificate, other evidence, or legal memorandum relied upon. Such motions shall be served as provided by paragraph (b)(4) of this section.

(*2*) *Response to motions.* A party's response to any written motion must be filed within ten (10) days after service of such motion, unless additional time is allowed for such response. The response shall be accompanied by any affidavit, certificate, other evidence, or legal memorandum relied upon. If no response is filed within the designated period, the parties may be deemed to have waived any objection to the granting of the motion. The Presiding Officer, Regional Administrator, or Administrator, as appropriate, may set a shorter time for response, or make such other orders concerning the disposition of motions as they deem appropriate.

(*3*) *Decision.* The Administrator shall rule on all motions filed or made after service of the recommended decision upon the parties. The Presiding Officer shall rule on all other motions. Oral argument on motions will be permitted where the Presiding Officer, Regional Administrator, or the Administrator considers it necessary or desirable.

(*4*) *Record of proceedings.* (*i*) The hearing shall be either stenographically reported verbatim or tape recorded, and thereupon transcribed by an official reporter designated by the Presiding Officer;

(*ii*) All orders issued by the Presiding Officer, transcripts of testimony, written statements of position, stipulations, exhibits, motions, briefs, and other written material of any kind submitted in the hearing shall be a part of the record and shall be available for inspection or copying in the Office of the Hearing Clerk, upon payment of costs. Inquiries may be made at the Office of the Administrative Law Judges, Hearing Clerk, 401 M Street SW., Washington, DC 20460;

(*iii*) Upon notice to all parties the Presiding Officer may authorize corrections to the transcript which involve matters of substance;

(*iv*) An original and two (2) copies of all written submissions to the hearing shall be filed with the Hearing Clerk;

(*v*) A copy of each such submission shall be served by the person making the submission upon the Presiding Officer and each party of record. Service under this paragraph shall take place by mail or personal delivery;

(*vi*) Every submission shall be accompanied by acknowledgement of service by the person served or proof of service in the form of a statement of the date, time, and manner of service and the names of the persons served, certified by the person who made service; and

(*vii*) The Hearing Clerk shall maintain and furnish to any person upon request, a list containing the name, service address, and telephone number of all parties and their attorneys or duly authorized representatives.

(*5*) *Participation by a person not a party.* A person who is not a party may, in the discretion of the Presiding Officer, be permitted to make a limited appearance by making an oral or written statement of his/her position on the issues within such limits and on such conditions as may be fixed by the Presiding Officer, but he/she may not otherwise participate in the proceeding.

(*6*) *Rights of parties.* (i) All parties to the proceeding may:

(A) Appear by counsel or other representative in all hearing and prehearing proceedings;

(B) Agree to stipulations of facts which shall be made a part of the record.

(7) *Recommended decision.* (i) Within 30 days after the filing of proposed findings and conclusions and reply briefs, the Presiding Officer shall evaluate the record before him/her, the proposed findings and conclusions and any briefs filed by the parties, and shall prepare a recommended decision, and shall certify the entire record, including the recommended decision, to the Administrator.

(ii) Copies of the recommended decision shall be served upon all parties.

(iii) Within 20 days after the certification and filing of the record and recommended decision, all parties may file with the Administrator exceptions to the recommended decision and a supporting brief.

(8) *Decision by Administrator.* (i) Within 60 days after certification of the record and filing of the Presiding Officer's recommended decision, the Administrator shall review the record before him and issue his own decision.

(ii) If the Administrator concludes that the State has administered the program in conformity with the Act and this Part, his decision shall constitute "final agency action" within the meaning of 5 U.S.C. 704.

(iii) If the Administrator concludes that the State has not administered the program in conformity with the Act and regulations, he shall list the deficiencies in the program and provide the State a reasonable time, not to exceed 90 days, to take such appropriate corrective action as the Administrator determines necessary.

(iv) Within the time prescribed by the Administrator the State shall take such appropriate corrective action as required by the Administrator and shall file with the Administrator and all parties a statement certified by the State Director that appropriate corrective action has been taken.

(v) The Administrator may require a further showing in addition to the certified statement that corrective action has been taken.

(vi) If the state fails to take appropriate corrective action and file a certified statement thereof within the time prescribed by the Administrator, the Administrator shall issue a supplementary order withdrawing approval of the State program. If the State takes appropriate corrective action, the Administrator shall issue a supplementary order stating that approval of authority is not withdrawn.

(vii) The Administrator's supplementary order shall constitute final Agency action within the meaning of 5 U.S. 704.

(d) Withdrawal of authorization under this section and the Act does not relieve any person from complying with the requirements of State law, nor does it affect the validity of actions taken by the State prior to withdrawal.

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[FR Doc. 88-12632 Filed 6-3-88; 8:45 am]
BILLING CODE 6560-50-M